MILITARY GOVERNMENT

OF

HOSTILE TERRITORY

IN TIME OF WAR.

BY

WILLIAM WHITING.

Not published.

BOSTON:
JOHN L. SHOREY,
13 WASHINGTON STREET.
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WASHINGTON, December 24, 1863.

HON. E. M. STANTON.

SIR: Enclosed I send you a copy of my bill, now before the Select Committee on the Rebellious States. As the provisions of this bill relate to the military occupation of the district in rebellion, the control of it, in my judgment, should be committed to the War Department. I will thank you for any suggestions you may have to make; or, if you have not time, I would like to have the bill submitted to the Solicitor of the War Department for his opinion.

Truly your friend,

(Signed,) J. M. ASHLEY.

WAR DEPARTMENT, SOLICITOR'S OFFICE,
WASHINGTON, D. C., March 24, 1864.

HON. J. M. ASHLEY.

SIR: Your letter of the 24th of December to the Secretary of War, of which I enclose you a copy, was referred by the Secretary to me at the time of its receipt. Other duties have prevented an earlier answer.

The provisions of your proposed statute involve the consideration of several questions of belligerent and of constitutional law, and among them are the following, viz.:—

The right of Congress (as claimed in the 1st section) to authorize the President to establish and maintain over the insurrectionary districts such provisional or military government as he may designate, and to continue it in force until new republican state governments shall be formed therein, in accordance with certain rules and regulations prescribed in the act therefor;

The legal authority of a government so constituted to administer not only military, but civil, criminal, and municipal laws, such as may be approved of by Congress;

The right of Congress to alter the former laws of the States, to adopt and require the enforcement of some, and the rejection of others;

The authority to administer military and martial laws, or the laws of war, and military orders and proclamations;

The power, constitutionally, to hold the people of a conquered district subject to military government, controlled, not by the war-power of the President, but by the legislative power of Congress acting through the President;

The question as to what laws are in force *ipso vigore* over the insurrectionary districts, *flagrante bello*, and what laws extend over the same as they are successively subdued by our arms;

The question as to the rights of citizens in rebellious states under the Constitution, as the war advances, and who can and who cannot be treated as public enemies therein:

These, and a great variety of similar questions, the answer to which lies at the foundation of the plan proposed in your bill, deserve a far more labored investigation than I have been able to give them; but I hope that some suggestions may be found in the following pages which may prove not unworthy of your consideration.

Very respectfully, your obedient servant,

WILLIAM WHITING.

PREFACE TO MILITARY GOVERNMENT.

THE following pages on "Military Government of Hostile Territory in Time of War," were written early in 1864, in answer to a letter of the Hon. J. M. Ashley, M. C., of Ohio, to the Secretary of War (dated December 24, 1863), which enclosed the draft of a bill for a military provisional government over insurrectionary States, proposed by Mr. Ashley for consideration by the "Special Committee of the House on the Rebellious States." In that letter he requested the Secretary "to make any suggestions he might have to make," or, "if he had not time to make any, to submit the bill to the Solicitor of the War Department for his opinion." This communication, with the proposed bill, were accordingly referred, as requested, by the Secretary of War. A copy of the letter, and of my reply, are hereto appended.

The subjects discussed are of great and growing importance. Clear and just views of the rights, powers, and obligations of the Government are necessary to a wise and consistent administration of affairs in the insurrectionary districts, during their transition from open hostilities to their peaceful restoration to the Union. A careful regard, in the beginning, to the proper limitations of authority in the respective departments of this government, will be necessary in order to avoid embarrassment and confusion in the end; and a just appreciation of the war powers of the President will tend to relieve patriotic citizens from apprehension, even if Congress should, for the present, omit further legislation on these subjects.

The following chapters are only a development of the principles stated in the "WAR POWERS," pages 54 to 57.

W. W.

WASHINGTON, D. C., March 24, 1864.

MILITARY GOVERNMENT.

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MILITARY GOVERNMENT.

CHAPTER I.

WAR — ITS MEANS AND RESULTS.

JUSTIFIABLE war may, by the law of nations, be rightfully continued until the purposes for which it was commenced have been accomplished. The overthrow and destruction of armies, the capture of enemies, the seizure of property, and the occupation of hostile territory, are but preliminary measures. In civil war, the final result should be the complete reëstablishment of lawful government on foundations strong enough to insure its continued supremacy without danger of subversion or of renewed assault. To attain that result, after active hostilities shall have ceased, order must be restored, and domestic tranquillity must be maintained. To preserve order, some means must be devised for restraining lawless aggressions in hostile districts, and for securing non-combatant citizens in the enjoyment of civil rights; otherwise, the country would be plunged into anarchy; successful campaigns would result only in waste of blood; conquest, however costly, could not be made permanent or secure, and legitimate government could not be successfully restored.

SOME FORM OF GOVERNMENT IS NECESSARY TO SECURE A CONQUEST.

Though it is a legitimate use of military power to secure the possession of that which has been acquired

by arms, yet it is difficult, by aid of any moderate number of troops, to guard and oversee an extended territory; and it is practically impossible for any army to hold and occupy all sections of it at the same moment. Therefore, if the inhabitants are to be permitted to remain in their domiciles unmolested, some mode must be adopted of controlling their movements, and of preventing their commission of acts of hostility against their conquerors, or of violence against each other. Stragglers from our army must be protected from murder; commissary's supplies must be guarded from capture by guerillas, and non-combatants must be secured in their social rights, and punished for their crimes. The total disorganization produced by civil war requires, more even than that produced by foreign war, the restraints of martial law. In countries torn by intestine commotions, neighbors become enemies, murders, robberies, destruction of property, and all forms of lawless violence are common, and, in the absence of military rule, would go unrestrained. Hence, to secure peaceful possession of such territories, some form of government must of necessity be established, whereby these crimes can be prevented or punished. Firm possession of a conquered province can be held only by establishing a government which shall control the inhabitants thereof.

Since war destroys or suspends municipal laws in the country where hostilities are carried on, no government is left there but such as is derived from the laws of war. All crimes must be restrained or punished by belligerent law, or go unwhipped of justice. Hence every case of wrong must be dealt with by *force of arms*, or must be disposed of by tribunals acting under sanction and authority of military power.

WHY GOVERNMENT IS ESSENTIAL TO THE SECURITY OF A CONQUEST.

The necessity of provisional or temporary government will become apparent by observing the condition of a people who have been overpowered by arms.

Suppose, by way of illustration, that in one of the border slave States in time of profound peace, by some sudden and unforeseen catastrophe, all the officers of civil government were to perish; that the judges, sheriffs, juries, and all courts of justice were to withdraw from that region; that the jails and penitentiaries were to be set open, and the escaped criminals were to reappear amid the scenes of their former crimes; that the officers of the United States had fled; that all public property had been seized by violence, and appropriated to private uses; that all restraints of law or of force were taken from wicked and unprincipled men; so that "might made right"; that debts could not be collected; that obligations the most solemn could not be enforced; that men and women could be shot, hung, or murdered in cold blood, if they differed in opinion on any question of religion, of politics, or of settlement of accounts; that private malice could be gratified by the midnight burning of a neighbor's house, and that injuries too foul and too horrid for mention could be perpetrated without means of redress; that all the laws of civilized society and the most sacred rights of humanity could be violated every hour of the day or night, with no protection for the innocent, no punishment for the guilty.

Such a state of things would *inevitably result in civil war.* Clans and associations would be formed; the whole people would sleep on their arms; revenge would inflame them; havoc and slaughter would be widespread; burning villages and smoking towns, devastated

lands and general ruin would demonstrate to all observers that *order* is essential to the social *existence* of a community, and that peace can be maintained only by some government of laws.

If the absence of government in time of peace would be followed by such calamitous results, they could not be avoided or escaped by a population already engaged in civil broils, if unprotected by military force, or military administration. In the rebellious States now occupied by our armies, we find a population split into factions, part slave, part freemen; traitors fighting against loyal men; non-combatants hostile to friends of the Union; our government; officers attempting to col to enforce the blockade in deadly enc and freebooters; banditti and guerilla assist, murdering in cold blood our so robbers plunderers cut throats incendiar ing their inhuman passions even upon and children; never was there a socie and revolutionary ering rev- lock- mies, who ssion- ere a ed a firm and powerful provisional government, following after the cessation of active hostilities. To withdraw, and so to lose control of conquered territory, either by military occupation of our armies in force, or by provisional government, would be to throw away all that has been gained by war, and basely to violate an obligation under the laws of war to the people who shall have been coerced into submission to our power.

MILITARY GOVERNMENT A MILD FORM OF HOSTILITIES — A CONCESSION — ITS TENDENCY.

The maintenance of a provisional military government is an economical mode of continuing hostilities

against a subjugated people, by dispensing with the unnecessary use of force.

To grant a government of any kind to a conquered people, while engaged in active hostilities, is a concession, a boon, a benefit, not an unjustifiable assumption of rights. The law of war justifies the use of *brute force* as the means of governing a public enemy. The judges under that law are military officers and sometimes common soldiers, without aid of law-books, counsellors, juries, codes, statutes, or regulations other than their own *will*. From their decrees there is no appeal; judge, jury, and executioner too often stand embodied in a single individual at the but-end of a Sharp's rifle.

In the civil war brought upon southern rebels by their own choice, to permit them to be governed by rules, regulations, statutes, laws, and codes of jurisprudence; to give them *jurists* able and willing to abide by standing laws, and thus to restore (as far as is consistent with public safety and the secure tenure of conquest) the blessings of civil liberty and a just administration of laws — most of which are made by those on whom they are administered — is an act of magnanimity worthy of a great people.

Such a government, though founded on and administered by military power, surely tends to restore the confidence of the disloyal by giving them rights they could not otherwise enjoy, and by protecting them from unnecessary hardships and wrongs. It cannot fail to encourage and support the friends of the Union in disloyal districts, by demonstrating to all the forbearance and justice of those who are responsible for the conduct of the war.

THERE MUST BE A MILITARY GOVERNMENT OR NO GOVERNMENT.

When the country can no longer be governed by the magistrate, it must be handed over to the soldier.

When law becomes powerless, force must be applied. When civil tribunals fall, military tribunals must rise.

Foreign territory acquired by the United States, by conquest or by treaty, does not, by force of the Constitution, become entitled to self-government,* nor does the *conquest* of public enemies within the domain of the United States confer upon them the right of self-government; for none but military control of the conqueror can exist in a hostile region.

There being in the belligerent district in the South no power or authority of the enemy which can be recognized as legitimate by the United States, our military power must be the basis on which our control over the affairs of the inhabitants living there must finally rest. By conquest, the local government and the courts of justice are deprived of their power, because the former is hostile, and the latter derived their authority from a public enemy. No local tribunal, civil, judicial, political, or military exists in a conquered district whose authority is recognized as lawful by the conqueror, except such as is established by him.† Hence the only government that can be organized is one whose authority is derived from the military power of the conqueror, and by the right of conquest. But as he is clothed

* 3 Story, Comm. 1318. Am. Ins. Co. *vs.* Canter, 1 Peters, 511, 542, 516.

† By the Act of July 17, 1862, it is made the duty of the President to seize the estate, etc., of all persons acting thereafter as *governors* of States, *members of legislatures*, or of *conventions*, or *judges of courts*, of the so-called Confederate States; and of *any person* holding *any office* under either of the said States. Such persons cannot therefore be *recognized* by our government otherwise than as criminals.

only with military authority, he can establish no government other than one of a military character. Therefore, if he finds it expedient to administer civil or municipal codes of law, they must be adopted and applied as military law, following therein, as far as practicable, the rules and forms of civil jurisprudence.

THE RIGHT TO ERECT MILITARY GOVERNMENTS IS AN ESSENTIAL PART OF THE WAR-POWER, AND IS FOUNDED IN NECESSITY AND SANCTIONED BY AUTHORITY.

Thus it has been shown that justifiable war ought to be prosecuted until the object for which it was commenced has been attained. That object is the restoration of the authority of the United States over all the territory and inhabitants thereof, ~~That~~ result can be accomplished with the least injury to ourselves and our enemy by substituting, as far as safety will permit, a temporary government over the ~~enemy~~ by military law, instead of continuing the use of mere force.

Reason and experience alike demonstrate the necessity of that mode of regulating a hostile community while passing through the intermediate state from open and general warfare to the reëstablishment of peaceful institutions. No government other than that authorized by the law of war is practically useful, or can lawfully exist, until peace is so far restored that the enemy will voluntarily submit to the laws of Congress.

The right to exercise control by armed force in time of war over hostile regions is a necessary part of the power of making and prosecuting war. If the people of a belligerent locality can be lawfully captured and held as prisoners of war, and can thus be subjected to the orders of a commanding officer, it would be unrea-

sonable to suppose that the same captives could not be held subject to the same orders, if permitted to go at large within the limits in which the military power of that officer was supreme.

Absolute necessity is the foundation and justification on which the right to enforce military government rests. That right has been used or practically acknowledged by most of the modern civilized nations. It is a right founded on reason, indispensable in practice, and is sanctioned by the authority of writers on international law, by jurists in Europe, and by the Supreme Court of the United States.

Wheaton, Law of Nations (Lawrence's ed.), 99.
Halleck, Intern. Law, 778.
Fleming *vs.* Page, 9 How. S. C. R. 615 (Appendix, 76).
Cross *vs.* Harrison, 16 " 190 (Appendix, 80).
Leitensdorfer *vs.* Webb, 20 How. 177 (Appendix, 86).
Am. Ins. Co. *vs.* Canter, 1 Peters, S. C. R. 542.
U. S. *vs.* Gratiot, 14 Peters, S. C. R. 526.
Also, see cases in the Appendix.

CHAPTER II.

THE CONSTITUTION AUTHORIZES THE PRESIDENT TO ESTABLISH MILITARY GOVERNMENTS.

Whenever the President is called on to repel invasion or to suppress rebellion by force, if the employment of military government is a useful and proper means of accomplishing that object, the Constitution confers on him the power to institute such government for that purpose.

The power of the President to establish military governments is derived from the Constitution, Art. II., Sec. 1, Cl. 1, and is a legitimate exercise of his authority as Commander-in-Chief.

Art. IV., Sec. 4, also provides that, "The United States shall guaranty to every State in this Union a republican form of government; and shall protect each of them against invasion, and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."

A condition of public affairs like that now existing in certain rebellious States, renders a military government thereof indispensably necessary to enable the United States to perform this guaranty of the Constitution. The authority, therefore, to institute such a government for that purpose belongs to the President, because he is bound to see the laws enforced; and also, under Art. I., Sec. 8, Cl. 18, to Congress, because it is bound to pass all laws necessary and proper to enable the President to execute his duties.

The topics now under consideration do not require any examination of the nature or extent of the right or duty of Congress, or of the President as an *executive* officer, to carry the Art. IV., Sec. 4, into effect. The erection and maintenance for a time, by executive authority, of a provisional government in any State or Territory as a "necessary and proper means" of carrying the guaranties of the Constitution into effect, may be the subject of explanation in a future essay.

The right of Congress is beyond question to establish temporary territorial or provisional governments over those parts of the country which, having been engaged in civil war against the United States, have by force of arms been coerced into submission to our government.*

It is not necessary in this place to make further explanations of Articles I. and IV., it being sufficient for our present purpose to refer to the powers conferred by the second Article.

The Constitution, Article II., Sec. 2, Cl. 1, provides that, "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual service of the United States."

This clause confers by necessary implication, upon the Commander-in-Chief of the Army and Navy, the right in time of war to subject public enemies to military government and regulation; for no limits to the power of the President, acting as a military commander, are prescribed in the Constitution. The laws of war, by which alone his operations should be regulated, establish his right to erect such government, and to maintain it by force of arms. The war powers of the

* See post Ch VI

President are interpreted and controlled only by the rules of belligerent law.*

As the authority to call into active service the Army and Navy, to capture or kill an adversary in battle, to seize and destroy his property, and to occupy and hold his lands by force, has been confided, without limitation, to the President, when the occasion for these measures occurs, would it not seem inconsistent to withhold from him the right to *keep* what he has acquired by arms, and to hold in his control (while war lasts) the enemy whom he has overthrown?

If it be said that the power thus claimed is not granted to the President *in express terms*, it may with equal correctness be said that the authority to carry on war, to suppress insurrections or to repel invasions, or to make captures on land or sea, is not conferred upon him in express terms. The Constitution enables the President to use war powers in no other way than by authorizing him under certain circumstances to call into service and to take command of the Army and Navy. But Congress is empowered to provide for "raising and maintaining armies," and to "make rules for captures on land and sea." Hence no one can doubt that when an army is raised, and captures are to be made, the President, being placed in command, has the right to employ these forces so as to accomplish the purpose for which they were organized, and therefore has the right to make captures, as unquestionably as he would have

* See cases subsequently cited.

Fleming *vs.* Page, 9 How. 615.
Cross *vs.* Harrison, 16 How. 90.
Leitensdorfer *vs.* Webb, 20 How. 177.
Wheaton, 99; War Powers, 54.

if ~~the~~ right ~~to make captures~~ had been conferred on him in ~~express~~ words,

There can be no reason to doubt that the army is placed under the supreme command of the Chief Magistrate for all purposes for which offensive or defensive war may be justly waged.

If he has the authority to commit any act of hostility for suppression of rebellion or repelling of invasion, he has equal right to commit *all* acts of hostility which may in his judgment be required to secure success in his military operations; and he has therefore the same right to erect a military government in hostile territory, under circumstances justifying it, as to perform any other military act.

The erection of such government over the territory and persons of a public enemy in time of war is an act of war, is in fact continuing against them a species of hostility without the use of unnecessary force. It is a mode of retaining a conquest, of continuing custody and supervision over an unfriendly population, and of subjecting malcontent non-combatants to the will of a superior force so as to prevent them from engaging in hostilities or inciting insurrections or breaches of the peace, or from giving aid and comfort to the enemy. Large numbers of persons may thus be held in subjection to the moral and physical force of comparatively few military men. Contributions may be levied, property may be confiscated, commerce may be restrained or forbidden, and an unfriendly population may be held in subjection by military government, for the same reasons which would justify the repression of their open hostilities by force of arms. If the Constitution allows the President to go to war, and to conquer the public enemy, the greater power must include the less; the

power to make a conquest must include the authority to keep and maintain possession of it, while war continues.

No one would doubt our right to occupy a hostile district of country by military posts, or by soldiers stationed in commanding positions, or to enforce upon all its inhabitants the rigid rules of martial law.

How, then, can the right be questioned to hold the same territory by a *small* number of soldiers, administering the same law, under the same authority, whether these military men be called by their ordinary titles, or be styled provost marshals or military governors?

If the humanity of the conqueror allows the rigid rules of martial law to be relaxed, and permits the forms of local jurisprudence to be continued under the same authority, so far as it may be done consistently with the security of the conquest, on what principle can his right to do so be denied?

DUTY OF THE CONQUEROR TO GOVERN THOSE WHOM HE HAS SUBJUGATED.

In view of the necessity of securing the ends for which war is waged, and the consequences following from the absence of government over conquered territory, it is undoubtedly the right and duty of the conqueror to erect and maintain, during war, *a provisional military government* over districts which have been subjected to his power.

This right is recognized and confirmed by the acknowledged laws of war, and by the decisions of the Supreme Court of the United States; the propriety and necessity of its enforcement have been shown by our experience in New Mexico and California, and in the States now in rebellion.

CHAPTER III.

DISTRIBUTION OF POWERS UNDER MILITARY GOVERNMENT.

Military governments control and regulate a great variety of public, private, civil, criminal, judicial, legislative, and military affairs. Their powers may be concentrated in a single officer, acting as a military governor, or they may be distributed among several persons acting under authority of the Commander-in-Chief, who may appoint one as commander, another as governor, a third as chief justice, and others as collectors of customs, in the same department.

Among the various modes of instituting military governments, one is by a proclamation of martial law, and by authorizing or appointing courts martial, courts of inquiry, and military commissions to carry that law into execution over belligerent districts. These institutions are best adapted to localities whose inhabitants are too hostile to admit of milder forms of administration.

The character of the laws, and the organization of the tribunals now *authorized by the statutes* to administer such government, will next be considered.

DIFFERENT KINDS OF LAW OF WAR.

Martial Law consists of a system of rules and principles regulating or modifying the rights, liabilities, and duties, the social, municipal, and international relations in time of war, of all persons, whether neutral or belligerent. — *Military Arrests*, *p.* 10. War Powers p 166 –

Military law is that part of the martial law of the land designed for the government of those who are engaged in the military service.

Of the rules and principles of martial law, many have as yet not been reduced to the form of statutes or regulations, although they are familiar in the practice of courts martial. The 69th Article of War refers to and adopts them as part of the martial law. They may be styled the "*lex non scripta*," the custom of war, the *common law of the army.*

In the United States, martial law is modified by military laws made by Congress as articles of war, by general regulations for the government of the army, by all statutes on military subjects which the Constitution empowers Congress to pass, and by all lawful orders of the President, as Commander-in-Chief, and of the Secretary of War, or officers acting under them.

Martial law, thus modified, is, when in force under the Constitution, administered within or without the United States by various *military tribunals*, including courts martial, military commissions, and courts of inquiry.*

MILITARY TRIBUNALS — HOW AUTHORIZED — THEIR CHARACTERISTICS.

The war courts now established by statutes, and recognized by judicial decisions, are called *courts martial, courts of inquiry*, and *military commissions.*

The Constitution, Art. I., Sect. 8, Clause 14, gives Congress power "to make rules for the government and regulation of the land and naval forces."

The 16th clause declares that Congress shall have

* See Benet. on Military Law, 11.

power to "provide for organizing, arming, and disciplining the militia; and for governing such part of them as may be employed in the service of the United States."

To provide for disciplining and governing militia in the service, means *to make laws, rules, or regulations* for their discipline and government. The power to make them would be inoperative, unless means could be employed to administer them. Congress, therefore, has power to provide *means* as well as rules for governing. No uncertainty is left upon this question; for the 18th clause of the same section gives Congress power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."

In the execution of this authority, Congress has provided for governing the army by erecting military courts, which are not ~~only~~ merely necessary and proper, but are the only practical means yet found for carrying into execution the rules and regulations so enacted. Such courts are therefore sanctioned as positively as if established by express language in the Constitution.

POWER OF THE PRESIDENT TO ESTABLISH COURTS OF WAR.

Not only has Congress power to create tribunals to administer "rules and regulations for governing the army and the navy," but there exists another independent power to create and establish courts with jurisdiction over a wider range of subjects and of persons. That power is vested by the Constitution in the President, as Commander-in-Chief of the army and navy,

when in actual service in time of war, and is a branch of the power to erect and maintain military governments.

Military courts are a usual and essential part of the machinery of military government; the right to institute the one necessarily implies the right to organize the other, and the jurisdiction of such courts embraces offences not declared punishable by any law of Congress, and persons out of the reach of any but military process.

How far it may be within the province of Congress to control the operations of war courts instituted by the President, need not be here discussed.

As has been said, one class of courts of war may be instituted by laws of Congress, and another class may be created by the President. Both are under his control as military chief of the forces, while at the same time he is bound to execute the laws of the land.

The right of the Commander-in-Chief, as well as the right of Congress, to create military courts, has been sanctioned by repeated decisions of the United States.*

DO COURTS OF WAR EXERCISE JUDICIAL POWER?

As the proceedings of war courts in some respects resemble those of courts of law, it has been questioned whether they exercise any part of the judicial power which is vested by the Constitution in "one Supreme Court and in such other inferior courts as CONGRESS may from time to time ordain and establish." — Constitution, Art. III., Sect. 1.

It has been decided by the Supreme Court of the United States, that military tribunals exercise no part

* See authorities in the Appendix.

of the *judicial* power, but only a portion of the military power of the Executive. And it has also been determined that the sentences or other lawful proceedings of courts martial of the United States are not the subject of appeal or revision in any judicial courts of the States or of the United States.*

WOULD JUDICIAL COURTS BE USEFUL AS WAR COURTS?

If it be said that judicial courts ought to employed for the administration of the laws of war, in order thereby to preserve the safeguards of civil liberty, the answer is that the whole system of judicial courts would be worse than useless in armies moving from place to place. Their organization is incompatible with the administration of military rights and remedies, by reason of local jurisdiction, jury trials, territorial limitations of process, and slowness of procedure, to say nothing of the inexperience of learned jurists in military affairs.

* Vallandigham's Case. (Appendix, 88).
Dynes *vs.* Hoover, 20 How. 81, 82. (Appendix, 84)

CHAPTER IV.

DIFFERENT KINDS OF MILITARY TRIBUNALS.

I. COURTS MARTIAL.

Courts martial have been recognized or established by express laws of Congress.

The Act of February 28, 1795, provided for calling out the militia and also for the organization of courts martial, designating the officers of whom they should be composed, prescribing punishments by these tribunals for persons who should fail (in the instances specified in Sect. 5) to obey the orders of the President. These courts derived their authority, not from any State law, but only from the statutes of the United States.*

It is, however, not questioned that either of the States may pass laws providing for the trial of such delinquents by State courts martial.†

The act of April 10, 1806, enacts articles of war, regulates (Article 64) the mode of organizing *general courts martial;* gives (Art. 65) the power of appointing them to general officers commanding an army, or colonels commanding a separate department, and institutes inferior courts martial (Art. 66); limits

* Commonwealth *vs.* Irish, 3 S. & R. 176.
S. C. 5 Hall's Law Jour. 476.
Meade *vs.* Dep. Marsh. Va. Dist. 5 Hall L. J. 536.

† Houston *vs.* Moore, 3 S. & R. 169.
Martin *vs.* Mott, 12 Wh. R. 19.

and requires confirmation of sentences (Arts. 65, 67), and provides (Art. 69) for the appointment of prosecuting officers usually called Judge Advocates. This act regulates the oaths of officers composing the court; the oath of the Judge Advocate, the punishment of the accused for standing mute; it provides for challenges, punishes misbehavior in court, contempts, or unbecoming conduct of persons convicted; it lays down rules relating to testimony and oaths of witnesses, and depositions, and designates (Sect. 99) such crimes or misconduct as are punishable by courts martial.

The Act of Aug. 5, 1861, gives power to commanders of divisions or separate brigades to appoint general courts martial in time of war.

The decisions of these tribunals are required to be reported to, and to be reviewed by, some superior officer who may confirm, modify, or set them aside. But the final judgments of courts martial are not liable to be reviewed or reversed by any *judicial* court of the United States.*

When a court martial has once acquired jurisdiction of the person and the subject-matter, that jurisdiction is exclusive of civil courts for that offence. But the same transaction may constitute an offence against municipal as well as military law, and, in such cases, the offender is liable to punishment by both.

II. MILITARY COURTS OF INQUIRY.

The Act of April 10, 1806, provides the manner of constituting such courts, their powers and proceedings. It recognizes the right of organizing them by the gen-

* Dynes *vs.* Hoover, 20 How. (Appendix, 84).
Vallandigham's Case. (Appendix, 88).

erals or commanding officers; power is conferred upon these courts to summon, to compel attendance, and to examine witnesses; the right of the accused to cross-examine witnesses is secured; and the mode of authenticating proceedings is prescribed.

But courts of inquiry being liable to abuse, are prohibited in all cases, except when demanded by the accused, or ordered by the President of the United States.

The Act of March 3, 1863, Sect. 25, gives power to every Judge Advocate of a court of inquiry to issue process to compel the attendance of witnesses, like that which State, Territorial, or District Courts issue in places where said court of inquiry is held.

These and other statutes show that this class of military courts is fully recognized by the laws of the United States.

III. MILITARY COMMISSIONS, INSTITUTED BY THE COMMANDER-IN-CHIEF, OR UNDER STATUTES.

Military commissions were first made familiar to the people of this country by General Orders No. 287, issued by General Scott at the head-quarters of the army, National Palace of Mexico, Sept. 17, 1847.

During the occupation of Mexico by our army many crimes were committed by hostile individuals against soldiers, and by soldiers against the Mexicans, not punishable by courts martial as organized under the Articles of War; and, as General Scott wrote in his order, "A supplemental code is absolutely needed. That *unwritten* code is martial law, as an addition to the *written* military code prescribed by Congress in the Rules and Articles of War, and which unwritten code all armies in hostile countries are forced to adopt, not only for their own

safety, but for the protection of the unoffending inhabitants and their property about the theatres of military operations, against injuries on the part of the army, contrary to the laws of war. . . . For this purpose it is ordered that all offenders in the matters aforesaid shall be promptly seized, confined, and reported for trial before military commissions to be duly appointed, etc."

These commissions were appointed, governed, and limited, as nearly as practicable, as prescribed for courts martial; their proceedings to be recorded, reviewed, revised, disapproved, or confirmed, and their sentences executed, all as nearly as might be as in the cases of the proceedings and sentences of courts martial, "provided that no military commission shall try any case clearly cognizable by any court martial, and provided also that no sentence of a military commission shall be put in execution against any individual belonging to this army, which may not be according to the nature and degree of the offence, as established by evidence, in conformity with known punishments in like cases in some one of the States of the United States of America."

"The administration of justice, both in civil and criminal matters, through the ordinary courts of the country, was nowhere and in no degree to be interrupted by any officer or soldier, except" in certain specified cases.

Martial, military, and civil or municipal law were administered in Mexico by General Scott, under such military commissions, with the exception above stated. But courts of this description were instituted *under the general war power of the Commander-in-Chief*, — a power which was fully conceded by the Supreme Court of the United States, — not under the authority of Congress. Congress has, however, recognized in express

terms "military commissions," in the act of March 5, 1863, Chap. 75; and having authorized the appointment of a Judge Advocate General, required all proceedings of such commissions to be returned to him for revision and record. This Act, Section 30, gives military commissions, equally with courts martial jurisdiction, in time of war, in case of "murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit rape, and larceny, when committed by persons who are in the military service of the United States, and subject to the articles of war."

Spies are also, by the same Act, Section 38, punishable with death by sentence of a military commission.

The several statutes above cited show that Congress, in pursuance of its powers under the Constitution, has recognized and established courts martial, courts of inquiry, and military commissions.

Courts of the same denomination, but exercising a much broader jurisdiction of persons and subjects, have been organized and established by the President of the United States, under the war powers delegated to him by the Constitution, as Commander-in-Chief of the army and navy; and the binding authority of such courts has been admitted and solemnly asserted by the Supreme Court of the United States. Tribunals instituted by the war power of the President are those through which it is most usual to apply the laws of war in enemy's country, while hostilities are in progress, and for a certain length of time after a declaration of peace.

All these tribunals constitute usual and necessary parts of the machinery of warfare, and are the essential instruments of that military government by which alone the permanency of conquest can be secured.

IV. COURTS OF CIVIL JURISDICTION UNDER MILITARY AUTHORITY.

In the preceding pages it has been shown that the right of the President, as Commander-in-Chief of the army, to organize and administer government in all its branches by military power, in time of war, over belligerent districts of country recovered from a public enemy, and his right to subdivide and delegate those powers to different persons acting under his orders, are sanctioned by the Constitution and laws of Congress, the decisions of the Supreme Court, and by our practice in former wars.

The same rights have been exercised during the present civil war. President Lincoln has appointed as Governor of the State of Louisiana, Brigadier-General Geo. F. Shepley; as Judge of the Provisional Court of the same State, Hon. Charles A. Peabody; as Military Commander of the department containing Louisiana, Maj.-Gen. B. F. Butler; and General Butler has appointed to act under him a Sequestration Committee.

The commissions and orders under which they have acted are as follows: —

COMMISSION AS MILITARY GOVERNOR.

WAR DEPARTMENT, WASHINGTON CITY,
June 3, 1862.

HON. GEORGE B. SHEPLEY, &c. &c.

SIR: — You are hereby appointed Military Governor of the State of Louisiana, with authority to exercise and perform, within the limits of that State, all and singular, the powers, duties, and functions pertaining to the office of Military Governor (including the power to establish all necessary offices and tribunals and suspend the writ of *habeas corpus*), during the pleasure of the President, or until the loyal inhabitants of that State shall organize a civil government in conformity with the Constitution of the United States.

By the President.

(SEAL OF U. S.)

E. M. STANTON,

Secretary of War.

Attested by the Adjutant-General.

* The President has more recently appointed as Judge of the Dist Court of the Dist. for the eastern Dist. of Louisiana, How Charles A. Duvall, whose nomination has been confirmed by the Senate. He has decided many important prize cases

EXECUTIVE ORDER, ESTABLISHING A PROVISIONAL COURT IN LOUISIANA.

EXECUTIVE MANSION,
WASHINGTON, October 20, 1862.

The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a Court of Record for the State of Louisiana, and I do hereby appoint CHARLES A. PEABODY, of New York, to be a Provisional Judge to hold said Court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the Courts of the United States and Louisiana — his judgment to be final and conclusive. And I do hereby authorize and empower the said Judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a Prosecuting Attorney, Marshal, and Clerk of the said Court, who shall perform the functions of Attorney, Marshal, and Clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said Judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana. These officers shall be paid out of the contingent fund of the War Department, compensation as follows: . . . . . Such compensations to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such Judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

SEQUESTRATION COMMISSION.

GENERAL ORDERS No. 91.

HEAD-QUARTERS, DEPARTMENT OF THE GULF,
NEW ORLEANS, November 9, 1862.

The Commanding General being informed, and believing, that the district west of the Mississippi River, lately taken possession of by the United States troops, is most largely occupied by persons disloyal to the United States, and whose property has become liable to confiscation under the acts of Congress

and the proclamation of the President, and that sales and transfers of said property are being made for the purpose of depriving the Government of the same, has determined, in order to secure the rights of all persons as well as those of the Government, and for the purpose of enabling the crops now growing to be taken care of and secured, and the unemployed laborers to be set at work, and provision made for the payment of their labor, —

To order, as follows: —

I. That all the property within the district to be known as the "District of Lafourche," be and are hereby sequestered, and all sales or transfers thereof are forbidden, and will be held invalid.

II. The District of Lafourche will comprise all the territory in the State of Louisiana lying west of the Mississippi River, except the parishes of Plaquemines and Jefferson.

III. That

Major JOSEPH M. BELL, Provost Judge, President,

Lieut. Col. J. B. KINSMAN, A. D. C.,

Capt. FULLER (75th N. Y. Vols.), Provost Marshal of the District,

be a commission to take possession of the property in said district, to make an accurate inventory of the same, and gather up and collect all such personal property, and turn over to the proper officers, under their receipts, such of said property as may be required for the use of the United States army; to collect together all the other personal property, and bring the same to New Orleans, and cause it to be sold at public auction to the highest bidders, and, after deducting the necessary expenses of care, collection, and transportation, to hold the proceeds thereof subject to the just claims of loyal citizens and those neutral foreigners who in good faith shall appear to be the owners of the same.

IV. Every loyal citizen or neutral foreigner who shall be found in actual possession and ownership of any property in said district, not having acquired the same by any title since the 18th day of September last, may have his property returned or delivered to him without sale, upon establishing his condition to the judgment of the Commission.

V. All sales made by any person not a loyal citizen or foreign neutral, since the 18th day of September, shall be held void, and all sales whatever, made with the intent to deprive the Government of its rights of confiscation, will be held void, at what time soever made.

VI. The Commission is authorized to employ in working the plantation of any person who has remained quietly at his home, whether he be loyal or disloyal, the negroes who may be found in said district, or who have, or may hereafter, claim the protection of the United States, upon the terms set forth in the memoranda of a contract heretofore offered to the planters of the parishes of Plaquemines and St. Bernard, or white labor may be employed at the election of the Commission.

VII. The Commissioners will cause to be purchased such supplies as may be necessary, and convey them to such convenient depots as to supply the

planters in the making of the crop; which supplies will be charged against the crop manufactured, and shall constitute a lien thereon.

VIII. The Commissioners are authorized to work, for the account of the United States, such plantations as are deserted by their owners, or are held by disloyal owners, as may seem to them expedient, for the purpose of saving the crops.

IX. Any persons who have not been actually in arms against the United States since the occupation of New Orleans by its forces, and who shall remain peaceably upon their plantations, affording no aid or comfort to the enemies of the United States, and who shall return to their allegiance, and who shall, by all reasonable methods, aid the United States when called upon, may be empowered by the Commission to work their own plantations, to make their own crop, and to retain possession of their own property, except such as is necessary for the military uses of the United States. And to all such persons the Commission are authorized to furnish means of transportation for their crops and supplies, at just and equitable prices.

X. The Commissioners are empowered and authorized to hear, determine, and definitely report upon all questions of the loyalty, disloyalty, or neutrality of the various claimants of property within said district; and further, to report such persons as in their judgment ought to be recommended by the Commanding General to the President for amnesty and pardon, so that they may have their property returned; to the end that all persons that are loyal, may suffer as little injury as possible, and that all persons who have been heretofore disloyal may have opportunity now to prove their loyalty and return to their allegiance, and save their property from confiscation, if such shall be the determination of the Government of the United States.

By command of MAJOR-GENERAL BUTLER.

GEO. C. STRONG,
A. A. G., Chief of Staff.

JURISDICTION OF COURTS APPOINTED BY MILITARY AUTHORITY TO ADMINISTER JUSTICE.

Military courts, being lawfully established by virtue of the war power of the President, as a part of his military government over the territory of a public enemy, with jurisdiction over all persons and things within the district limited in his commission to the judge, have the right to make and enforce rules for the creation and service of process, and for all other proceedings before them. Their judgments may be rendered subject to appeal, if so directed by the President. The orders and

decisions of the judges will be final and conclusive upon all subjects, matters, and persons over whom they have, by the terms of their commissions, exclusive and final jurisdiction. From such decisions and judgments there is no appeal to any judicial court of the United States.* They must be forever recognized by all departments of government as valid and conclusive.

DOES THE CONSTITUTION PROHIBIT SUCH PROCEDURES ?

The question may be asked whether courts administering municipal or local laws, condemning criminals without previous indictment, trial by jury, limitation of place in which trial shall be held, and without right of appeal, are not within the prohibitions of the Constitution.

The clauses referring to these subjects are as follows: —

Amendment, Art. V.

"No person shall be HELD *to answer* for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, *except* in cases arising in the land or naval forces; or in the militia when in actual service in time of war or public danger," etc.

Amendment, Art. VI.

"In all *criminal prosecutions* the accused shall enjoy the right to *a speedy and public trial by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," etc.

Amendment, Art. VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law."

* Dynes *v.* Hoover, 20 How. (See Appendix.)
Vallandigham's Case. (See Appendix.)

To obtain a correct view of the meaning and application of the fifth, sixth, and seventh articles of the Amendment above cited, it will be necessary to observe that the citizens owing allegiance to the Government of the United States are by civil territorial war divided into classes of persons having different rights and liabilities.

First, the inhabitants of that section of the country which upholds that Government; and, second, the inhabitants of that section of country who have become public enemies; also, there are two classes of loyal citizens, — first, those who are engaged in the military service; and, second, those who are not.

Military courts may be in two different conditions: —

First, ordinary courts organized and acting under provisions of statutes, and administering the laws of war upon persons engaged in our military service; and, second, courts established by the war power of the Commander-in-Chief, and administering the domestic government of territorial public enemies in a hostile district of country held by our military power.

None of these provisions of the Constitution have any application to *military courts or the proceedings thereof.* They relate only to *judicial power* conferred thereby on judicial courts.

The fifth article expressly excludes cases arising in the land and naval forces, among our own citizen soldiers and seamen.

Art. 6th secures a jury trial in open court in the State and district where the crime was committed, and refers only to a judicial proceeding relating to crimes in the ordinary judicial courts.

Art. 7th refers only to proceedings in common law courts.

These regulations of procedures in common law and other ordinary courts apply to tribunals of a character totally different from *military courts.* The Constitution sanctions courts military, and courts judicial, and it requires the ~~former~~ latter to be constituted according to these amendments, while the ~~latter~~ former are under no such restrictions.

The Supreme Court recognize this distinction, and say, in the case of Dynes *vs.* Hoover,* "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practised by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

Thus it is evident that whoever is subject to the jurisdiction of courts martial, etc., can claim none of the benefits of these Articles of Amendment, and that citizens of the United States who have been declared by our Government *public enemies* of the country, have no rights guaranteed to them under any provisions of our Constitution.

THE RIGHTS OF REBELS. — WHAT THEY CLAIM.

To form correct opinions in relation to the rights of persons inhabiting that part of the country now subjected to the government *de facto* of the so-called Confederate States, it is proper to ascertain what rights they claim.

Having founded new governments within the terri-

* 20 Howard, Rep. 79. (See Appendix.)

tory over which our national sovereignty extends, under the asserted right of revolution; having ratified those governments, both confederate and state, by popular conventions, by legislative acts of secession, by submission, by profession of allegiance, and by all other known modes of expressing assent and adherence thereto, they have publicly withdrawn from and disclaimed all allegiance to the United States. They demand that we should treat them as an independent nation. They not only assert no right to protection under our constitution, but wage open, barbarous, offensive war against the inhabitants of the loyal States and against our government. They seek recognition from and alliance with foreign countries, and if successful in arms, they will be entitled to compel the United States to submit to them as conquerors. Our territory, our government, and our population will then be subjugated to their control. Their laws and their institutions will then be forced upon us, and nothing but the overthrow and destruction of the public enemy can prevent this result.

They have already been recognized by leading European powers as BELLIGERENTS. They have demanded and have received from our government, the concession of many *belligerent rights;* as for instance, the exchange of prisoners of war captured on land; the release of confederate seamen condemned for piracy; and the recognition of flags of truce, and the blockade of seaports, under the law of nations.

The claim, so far as it can be ascertained, of the confederate *de facto* government, as against the United States, is, 1st, The concession of full belligerent rights, and, 2d, Their recognition as an independent nation. No demand of any right under our constitution or our laws has ever been made by the confederates. Those

who deny their liability to perform the obligations imposed on subjects of the United States, have not fallen into the absurdity of claiming the privileges of subjects. The confederates claim only such rights as the law of war, which is a part of the law of nations, secures to them. That claim this government is bound to concede, whenever it determines to treat them, not as subjects, but as belligerents.

Have the insurgents admitted liability on their part to regard our laws or constitution in carrying on war against us? Have they not forsworn their allegiance to this government, and can they claim protection while denying allegiance? Can an enemy justly assert any right under a constitution he is fighting to destroy? The insurgents deem themselves public enemies to the United States in open war, and admit their liability to abide by the stern rules of belligerent law. They demand no privilege under a constitution which, by commencing war, they have violated in every clause.

Is it not remarkable that persons who profess to adhere to our government, should set up pretensions on behalf of our adversaries which our adversaries themselves disclaim?

RIGHTS CONCEDED TO INSURGENTS.

Whoever makes war against a nation renounces all right to its protection. The people of the United States have founded a government to secure the "general welfare," by preventing enemies, foreign or domestic, from destroying the country. They did not frame a constitution so as to paralyze the power of self-defence. They have not forged weapons for their adversaries, or manacles for themselves.

The Constitution, in fact, guarantees no *rights*, but only

declares the *liabilities*, of public enemies, — if they are invaders, that they shall be repelled; if they are insurgents, that they shall be put down by force; if they are rebels, banded together in territorial civil war, then that civil war shall be fought through, and conquest and subjugation shall reëstablish lawful government. Any other result must be a destruction of the country, and therefore an overthrow of the Constitution.

In the enforcement of these hostile measures against public enemies, the most liberal concession demanded by the code of civilized warfare, is that traitors should be deemed belligerents; but, while enjoying the immunities, they must be subject to the liabilities, of war.*

Therefore, whether the Articles of Amendment of the Constitution, previously cited, apply to martial proceedings or not, is immaterial in determining the rights of a hostile people engaged in civil war against the United States.

The appeal to arms and the laws of war was forced upon us, because the insurrectionary districts refused to submit to the Constitution. They cannot, therefore, justly complain that under the laws of war they are no longer sheltered by that constitution which they have spurned.

ARE THE INHABITANTS OF INSURRECTIONARY STATES PUBLIC ENEMIES?

Whether persons inhabiting insurrectionary States are in law to be deemed "public enemies," is a *political* question, which, like similar questions arising under our form of government, is to be determined, *not* by judicial courts of law, but by the Legislative and Executive Departments.†

* See the Prize Cases, 2 Black, 638.

† Some of the consequences flowing from the *status* of a public enemy, have been stated in a previous publication. (See War Powers, 8th Ed. pp. 236–244.)

Among those subjects which, as the Supreme Court of the United States has already decided, are finally to be determined by the political departments of government, are the following, viz:—

Questions of boundary between the United States and foreign countries.*

"The question like this," says Chief Justice Marshall, "respecting boundary of nations, is, as has been truly said, more a political than a legal question; and, in its discussion, the courts of every country must respect the pronounced will of the legislature." Taney C. J. says: "The legislative and executive branches having decided the question, the courts of the United States were bound to regard the boundary determined on by them as the true one." †

Questions as to the sovereignty of any foreign country or its independence.

"To what sovereignty any island or country belongs is a question which often arises before courts."

"And can there be a doubt that when the *executive* branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, *assume a fact* in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire whether the Executive is right or wrong. It is enough to know that, in the exercise of his constitutional functions, he *has decided* the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the United States."

* Foster & Elam *vs.* Nelson, 2 Pet. 307.

† United States *vs.* Percheman, 7 Pet. 51.
United States *vs.* Arredondo (1832), 6 Pet. 711.
Garcia *vs.* Lee, 12 Pet. 516, 517, 520, 522.

"In the cases of Foster *vs.* Nelson, and Garcia *vs.* Lee, this Court have laid down the rule *that the action of the political branches of the government,* in a matter that belongs to them, is conclusive." *

Questions as to the recognition of State governments in the Union.

Whether the government of Rhode Island *was the duly constituted* government of that State, was a question which belonged to the political and not the judicial power, so that the Circuit Court of the United States had not the power to try and determine this question, so far as the United States was concerned.

Congress has delegated to the President, by the Act of Feb. 28, 1795, the power to decide for the purposes of that act, whether a government organized in a State is the duly constituted government of that State, and, after he has decided this question, the courts of the United States are bound to follow his decision.†

Questions as to the status of foreign nations whose provinces or dependencies are in *revolution — foreign invasion* of our own country — and *insurrection, or rebellion, or civil war, at home, and the status of those engaged therein,* are political questions determinable by the executive and legislative branches of our government. ‡

* Williams *vs.* Suffolk Ins. Co. 13 Peters, S. C. R. 420 (McLean J.) See also Gelston *vs.* Hoyt, 3 Wheaton, 246, United States *vs.* Palmer, 3 Wheaton, 610.

† Luther *vs.* Borden, 7 Howard, S. C. R. 40, 42, 43, 44.

‡ Luther *vs.* Borden, 7 Howard, 40, 44. Lawrence's Wheaton, 514. Martin *vs.* Mott, 12 Wheaton, 29, 30. Law Reporter, July, 1861, 148. The "Tropic Wind," Op. of Judge Dunlap. The prize cases "*Hiawatha*" and others, 2 Black. War Powers, 8th ed. 141 & 215. See also charge of Nelson J. on the trial of the officers, etc., of the Savannah, p. 371. In this case the rebel privateer put in as a defence his commission to cruise under the confederate flag; and the same defence was made in Philadelphia by other persons indicted for piracy. In both cases it was held that the courts must *follow the decision of the executive and legislative departments* in determining the political status of the Confederate States. See also Smith's Trial, p. 96.

† Santissima Trinidad 7 Wheaton 305.
Upton's Maritime Warfare & Prize 2 Ed. p. 444 to 107.

Therefore, it will be the province of the political departments of our government to decide, among other questions, —

1. Whether the Confederate States shall have the status of belligerents.

2. Whether they have the status of *public enemies.*

3. Whether local governments to be formed within the territory now in rebellion shall be recognized.

4. Whether and when a state of *peace* shall be declared or recognized.

5. Whether the Confederate States shall be recognized by receiving their commissioners, or by acknowledging their independence.

On these and similar questions the courts are bound to follow the decisions of the President and of Congress.

THE PRESIDENT.

The action of the Executive Department has stamped as "public enemies" all persons residing in the insurrectionary States.

The President issued a proclamation on the 15th April, 1861, which declares that the laws had been opposed and their execution obstructed for some time past, in certain States, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings. He called out 75,000 of the State militia in order to suppress said combinations.

On the 19th of April, 1861, he proclaimed a *blockade* of the ports within certain States, in pursuance of the statutes of the United States and *the laws of nations* in such case provided, and gave warning that vessels breaking or attempting to break that blockade should be *captured* and *condemned as lawful prize.* He also declared

that any persons who, under pretended authority of said States, should molest any United States vessel, should be deemed pirates. This blockade was, by a subsequent proclamation of April 27, 1861, extended to other States.

By the proclamation of May 10, 1861, he suspended the privilege of the writ of habeas corpus in the islands on the coast of Florida.

On the 16th of August, 1861, in pursuance of an Act of Congress, he declared "that the inhabitants of the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida (excepting the inhabitants of Western Virginia, etc.), *are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States, and other parts of the United States, is unlawful, and will remain unlawful until such insurrection shall cease, or has been suppressed.*" He then declares *forfeiture* of goods, or conveyances thereof, *going to* said States, and, after fifteen days, of *all vessels belonging in whole or in part to any inhabitant* of any of said States (except as aforesaid), wherever found.

On the 1st of July, 1862, he again declared the same States in *insurrection and rebellion*, so that the taxes could not be collected therein, in pursuance of the Act of 1861, Chapter 45.

On the 25th of the same month, he gave a further warning under the provisions of the sixth section of the Act of July 17, 1862, requiring rebels to "*return to their proper allegiance to the United States*, on pain of forfeitures and seizures," as provided for in said Act.

The proclamation of Sept. 22, 1862, was made by the President as an Executive officer and as Commander-

in-Chief of the Army and Navy, "that the *war* will be prosecuted hereafter as heretofore for the purpose," etc.; that slaves in *States* which should be *in rebellion* on the first day of the following January should be free, and that he would, by subsequent proclamation, designate such States; and at that date (January 1, 1863), the President did designate such States, and did declare "*that all persons held as slaves within said States*, etc., are and hereafter shall be free," and "that the executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons."

From an examination of these proclamations issued by President Lincoln, by virtue of his executive power and as a military chief, it cannot be doubted that in the most solemn and formal manner he has recognized the *inhabitants* of the insurrectionary States as in *civil war*, and therefore *as public enemies*. ~~The~~ this proclamation characterizes these hostilities as "the war now prosecuted;" he requires the rebels to "return to their proper allegiance to the United States," admitting that they have ~~attempted to break~~ renounced such allegiance; ~~and~~ in all his proclamations, excepting the first, he treats *the inhabitants* of the rebellious States as *in simili statu* (with specified exceptions only), and in the proclamation of Jan. 1, 1863, no exceptions are made of any class of persons within the designated districts.

The Executive Department has thus definitely settled the question that all inhabitants of the designated States are *public enemies*, — First, by proclamations depriving them of slaves, of ships, and of property used in commerce; by a blockade and a declaration of *non-intercourse;* by claiming against them the *rights of war;* and by ~~admitting~~ asserting that the existing hostilities are "WAR."

Second, by extending to the insurgents the usual rights and privileges of a belligerent public enemy; as by release of captured pirates (under the order of the President issued from the State Department) as prisoners of war,* by exchange, *by cartel*, of prisoners of war captured on land, by claiming the right of retaliation, and by various other acts, which are legitimate in the conduct of the war, but irreconcilable with the assumption that the United States are not engaged in war, but only in enforcing the laws against certain criminals who have violated certain statutes by engaging in insurrection or rebellion.

If these acts and these proclamations do not show that the Executive Department has *declared* and *determined* the *status* of the inhabitants in insurrection to be that of *public enemies*, it would be difficult to conceive of any course of executive proceedings that would have had that effect.

*

CONGRESS.

The action of the Legislative Department, which has been in harmony with that of the President, has in like manner definitively pronounced the inhabitants of insurrectionary States to be public enemies. In the war of 1812, between the United States and Great Britain, the Act of July 6, 1812, and the Act of February 4, 1815, indicated the character and extent of legislation necessary to record the decision of the Legislative Department, that Great Britain was at that time a public enemy.

But since the present rebellion commenced, Congress has enacted laws far more stringent and comprehensive than either of those above cited, against the inhabitants of the rebellious States. The four chief acts which re-

* See War Powers, 8th ed. p. 215.

* The effect of the President's message & proclamation of amnesty of Dec. 8. 1863, upon the persons property & political rights of the inhabitants of rebellious states far transcends in importance either of his previ

cord the decision of Congress on the question whether rebels are *public* or private enemies, are, —

1. The Act of July 13, 1861, ch. 3.
2. " " " May 20, 1862, ch. 81.
3. " " " July 17, 1862, ch. 195.
3. " " " March 12, 1863, ch. 120.

In the extraordinary but brief session of the 37th Congress, which assembled on the 4th of July, 1861, and lasted but thirty-three days, statutes of the highest importance were passed, and among them none will hereafter attract more attention than the Act of July 13, 1861, ch. 3. Means were thereby provided for collecting the revenue in rebellious districts by the use of military and naval forces, the President was authorized to close ports of entry, and it was enacted, in the fifth section, —

" That whenever the President, in pursuance of the provisions of the second section of the act entitled ' An act to provide for the calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for that purpose,' approved February 28, 1795, shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then in such case it may and shall be lawful for the President, by proclamation, to *declare* that *the inhabitants of such State, or any section or part thereof* where such insurrection exists, are in a state of insurrection against the United States; and thereupon *all commercial intercourse* by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and *all goods and chattels, wares and merchandise coming from* said State or section into the other parts of the United States, and all *proceeding to* such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be *forfeited* to the United States."

Also, in the sixth section, it was enacted, —

" That from and after fifteen days after the issuing of the said proclamation, as provided in the last foregoing section of this act, any ship or vessel belong-

ing in whole or in part to any citizen or inhabitant of said State or part of a State whose inhabitants are so declared in a state of insurrection, found at sea, or in any port of the rest of the United States, shall be forfeited to the United States."

By the Act of May 20, 1862, ch. 81, further provisions were made interdicting commerce between loyal and disloyal States, and new forfeitures and penalties were prescribed.

By the Act of July 17, 1862, ch. 195, a new punishment for the crime of treason was declared, penalties were prescribed against all persons who should engage in, or give aid or comfort to the rebellion or insurrection, and they were declared to be disqualified from holding office under the United States. By Section fifth it was enacted, —

"That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estates and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States; that is to say, —

"First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the United States.

"Secondly. Of any person hereafter acting as president, vice-president, member of Congress, judge of any court, cabinet officer, foreign minister, commissioner, or consul of the so-called confederate states of America.

"Thirdly. Of any person acting as governor of a State, member of a convention or legislature, or judge of any court of the so-called confederate states of America.

"Fourthly. Of any person who, having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called confederate states of America.

"Fifthly. Of any person hereafter holding any office or agency under the government of the so-called confederate states of America, or under any of the several states of the said confederacy, or the laws thereof, whether such office or agency be national, state, or municipal in its name or character. *Provided*, That the persons, thirdly, fourthly, and fifthly above described, shall have accepted their appointment or election since the date of the pretended ordinance of secession of the State, or shall have taken an oath of allegiance to, or to support the constitution of the so-called confederate states.

"Sixthly. Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such perso : for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Section sixth provided that if any persons other than those above named, had engaged in, or aided the armed rebellion, and should not within a limited time *return to their allegiance*, their property should be liable to seizure and condemnation.

Section seventh provided proceedings for confiscation of such property, real and personal, —

"And if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as *enemies' property*, and become the property of the United States."

"Slaves escaping, and taking refuge within the lines of the army, and all slaves captured from, or deserted by, those engaged in rebellion, and coming under control of the government of the United States, and all slaves of such persons found or being within any place occupied by rebel forces, and afterwards occupied by forces of the United States, shall be deemed captives of war," etc.

The Act approved March 12, 1863, ch. 120, § 1, provides that agents may be appointed by the Secretary of the Treasury to collect all abandoned and captured property in any State or Territory designated as in insurrection by the proclamation of July 1, 1862,

"*Provided*, that such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordinance, ships, steamboats, or other water craft, and the furniture, forage, or other military supplies or munitions of war."

Section fourth of the same statute, provides, —

"That all property coming into any of the United States not declared in insurrection as aforesaid, from within any of the states declared in insurrec-

tion, through or by any other person than any agent, duly appointed under the provisions of this act, or under a lawful clearance by the proper officer of the Treasury Department, shall be confiscated to the use of the government of the United States. And the proceedings for the condemnation and sale of any such property shall be instituted and conducted under the direction of the Secretary of the Treasury, in the mode prescribed by the eighty-ninth and ninetieth sections of the act of March 2, 1799, entitled, 'An act to regulate the collection of duties on imports and tonnage.' And any agent or agents, person or persons, by or through whom such property shall come within the lines of the United States unlawfully, as aforesaid, shall be judged guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned for any time not exceeding one year, or both, at the discretion of the court. And the fines, penalties, and forfeitures accruing under this act, may be mitigated or remitted in the mode prescribed by the act of March 3, 1797, or in such manner, in special cases, as the Secretary of the Treasury may prescribe."

From these statutes it is seen that the Legislative Department has recognized "certain districts of country, not only as in a state of insurrection and rebellion," but as "*carrying on a war*" against the United States. Commercial intercourse has been interdicted between the insurrectionary and the loyal States, and property found *in transitu* is made liable to seizure and confiscation, for the use of the United States, and property of persons engaged in the rebellion is to be seized and confiscated as ENEMIES' property. The *inhabitants (that is to say* ALL *the inhabitants) of the insurrectionary States, or parts of States, are declared to be in a state of insurrection against the United States, and any ship or vessel, belonging in whole or in part to any citizen or inhabitant of such State, whose inhabitants are so declared in insurrection, found at sea, or in any part of the rest of the United States, shall be forfeited to the United States.*

Thus belligerent rights derived from the acknowledged existence of civil territorial war, have been plainly asserted and exercised by Congress, and the insurrectionists have been treated as a *public enemy* in every form and manner known to legislation, and in language far more

stringent than that used by Great Britain when, by the Non-intercourse Act, our revolutionary war was changed, by act of Parliament, into a public territorial war.*

THE SUPREME COURT.

Has the Supreme Court thus far followed the decisions of the political departments of government on the question as to the *status* of rebels as public enemies? — that is to say, enemies within the sense of international law?

This question will be answered by reference to the cases which have arisen since the beginning of the war.

By far the most important decisions on this subject were made in March, 1863, and are commonly known as "The Prize cases." †

In these opinions the judges recognize the insurrectionists as public enemies, following, as was their duty, the decision of the Political Department of the government.

How could judgment, condemning these vessels as lawful prize, be sustained if the belligerents were not admitted to be *public enemies?* Though a vessel, captured while trading with an enemy, may be lawful prize, irrespective of the character of the trader, whether friendly, neutral, or hostile, to whom it belongs, yet it is because his vessel may aid a *public enemy*, that it becomes liable to capture. No property of a friendly or neutral power can be lawfully captured because it might aid a criminal, a robber or a pirate, or an *insurgent*, ~~who if he can in any sense be called an enemy, is~~ merely as a *private* or personal while acting

* See Act 16 Geo. 3, 1776.

See dissenting opinion in The Prize cases. War Powers, 153.

† The opinion of the Court, together with that of the dissenting Judges, may be found by reference to the 2d Vol. Black's S. C. Reports, or to the 8th ed. of the War Powers, pages 140 to 156, and an analysis of these opinions may be found in the same volume, pages 238 to 243.

enemy of the United States. The law of prize has no application to the case of personal or private enemies, and cannot be invoked to justify a capture of private property, unless there exists a *public enemy* and a *state of war*.

Blockades, under the law of nations, can lawfully exist only when there is a *public enemy* to the country ~~declaring it.~~ *which proclaims and enforces them.*

The Circuit Courts of the United States, having adjudged the inhabitants of States declared in rebellion to be public enemies, have therefore decided that they are not entitled to sue in any of the national courts.*

Doubtless the disability to sue in courts of the United States, and all other disabilities resulting from the *status* of a public enemy, may be removed. But it is for the President and Congress to determine what sound policy and public safety shall require.

It is a matter of congratulation that there is no want of harmony between the different departments of Government, and that the Supreme Court has not gone beyond its legitimate functions in time of civil war; but has, by following the decisions of the political departments on political questions, given the best evidence that, even in revolution, it will not be necessary for the safety of the country to overthrow its judiciary.

Thus it has been shown that the question whether the inhabitants of the States in insurrection are "*public enemies*," and entitled to the rights, or subject to the liabilities of belligerent law, is to be decided, not by the

* See Bouneau *vs.* Dinsmore, 24 Law Rep. 381.
S. C. 19 Leg. Inst. 108.
Israel G. Nash (of North Carolina) Complt. *vs.* Lyman Dayton *et al.* (decided by Nelson, Judge of the U. S. Circuit Court of Minnesota.)
See also U. S. *vs.* The Isaac Hemmett, Legal Jour. 97.
U. S. *vs.* The Allegheny, ib. 276.

judicial, but by the *political* departments of this Government. That the Executive and Legislative departments have formally and finally decided that the rebels are a *public enemy*, and are subject to *the laws of war*. That the Judicial Department has submitted to and followed that decision; and that the question as to the *political status* of rebellion, is now no longer open for discussion. That whatever rights, other than the rights of war, may be conceded to the inhabitants of rebellious territory, will be bestowed on them from considerations of policy and humanity, and not from admission of their claims to rights under our Constitution.

CHAPTER V.

DELEGATION OF ~~JUDICIAL~~ AUTHORITY.

Judicial authority cannot be delegated, and as the commander of a department, or other officer who presides over a military tribunal while determining a case of civil jurisdiction, acts in a *quasi* judicial capacity, a question has been made whether the right to hold such courts can be delegated by the President to his officers. Although such proceedings of the war courts as complaints of parties, pleadings, examination of witnesses, deliberations and decisions of judges, in many respects resemble those of judicial courts, yet, as they are not deemed judicial within the true meaning of the Constitution, no valid objection arises from that source, to the delegation of the power to hold military courts, to such officers as may be appointed by the President.

This, and nearly all the war powers, must be exercised through officers acting under the Commander-in-Chief; for his authority must be exerted at the same time in different and distant places; and as he cannot be omnipresent, that authority which could not be delegated would become comparatively useless. The practice of the Government has, from the beginning, been in accordance with this view of constitutional law.

The power of the President is in part delegated to his Secretary of War, whose acts are deemed in law to be the acts of the President.* The commanders of military

* Wilcox *vs.* Jackson, 13 Pet. R. 498.
Opinion of Wm. Wirt, Att'y Gen. (July 6, 1820).
U. S. *vs.* Eliason, 16 Pet. S. C. R. 291.

departments are clothed with authority transferred to them by the Commander-in-Chief. Therefore, if that authority is not limited so as to prevent it, they have the right, while in the enemy's country in time of war, to organize military courts martial and commissions, and to administer all other belligerent laws. Tribunals so organized may exercise all functions properly conferred upon them, and their decisions are not only valid, but are not subject to reversal by any judicial court; but only by the final action of the President.

So also, if a military governor is placed over such hostile district, clothed with the powers of the Commander-in-Chief, he may himself administer the laws of war over those subjected thereto within his precinct, and may establish courts military and civil, with jurisdiction over all persons and things therein. And whether he acts on his own discretion in so doing, under general orders, or under special orders in each case, he is, according to military law, responsible only to his superior officer.

Although no *civilian*, or *civil* or *merely executive* officer, has a right to institute ~~or act in~~ a military court, unless deriving special authority to do so from some law of Congress or from military orders.

There seems, therefore, to be no reason why any of the war powers, in time of actual service, may not be delegated to military men by the President, or by any other military officer who possesses them; and no reason for making any distinction between the different classes of powers which may be so delegated.

CHAPTER VI.

HOW MILITARY OR PROVISIONAL GOVERNMENTS MAY BE CREATED AND REGULATED BY CONGRESS.

The right and duty of administering purely military government belongs to the war-making power, which is usually subject only to the rules of the belligerent law. When that power is regulated by any treaties, constitution, or statutes of the invading country, then military governments established under it must be conducted in accordance with the laws of war, as modified by such legislative, constitutional, or treaty restrictions. Thus, wherever in the United States such a government shall be instituted by the Commander-in-Chief, his administration of it may, to a certain extent, and with certain limitations, be regulated by acts of Congress.

The right of the United States to acquire territory by purchase, treaty, or annexation, necessarily implies the existence in Congress of the power to establish some form of government over *regions* thus *added to the country*. Conquest itself confers on the conqueror authority to make laws for the conduct of people subjected to his power. The right of the government when conqueror in civil territorial war to make rules and regulations relating to conquest and captures may, by the Constitution of the United States, be exercised by the Legislative Department.

A provisional government, partaking in a high degree of a martial character, may be ordained and established over *subjugated districts* in time of *civil* war, by laws

of Congress, and may be administered by civilians or by military persons, appointed by the President, according to the requirements of the statutes.

It is also the duty of Congress to pass all laws which are proper and fit to aid the President in carrying into effect his ~~official duty~~ obligation, to suppress rebellion and enforce the laws, to secure domestic tranquillity, and to guaranty to each State a republican form of government. And as the creation and administration of military or provisional governments is an essential means of accomplishing these objects, it would seem for this reason also to be the duty of Congress, in aid of the Commander-in-Chief, and without interfering with his military operations, to erect governments over the subjugated districts, clothed with powers adequate to administer the laws of war, subject to the Constitution and the Statutes of the United States, and to such orders as the President may from time to time issue, not inconsistent therewith. Governments thus established rest not alone upon the military power of the President as Commander-in-Chief of the army and navy, but upon the war powers of Congress, and should be so organized as to endure until the people of these districts shall be again permitted to resume self-government, and be again clothed with their former political rights.*

Therefore, although the President may, while engaged in hostilities, and in the absence of laws restricting his authority, enforce belligerent rights against a public enemy, Congress also may establish rules and regulations which, without interfering with his powers

* The model of our territorial governments, in time of peace, is the Ordinance of 13th July, 1787.

See 3 Story, Com. on Const. 1312.

Webster's Speeches, Jan. 1830, pp. 360–364.

Const Art 1. Sec 8 cl 18 see ante p 19.

as commander of the army, it will be his duty to administer.

In a province to be subdued by soldiers, the only means by which the will of Congress, or the will of the head of the army can usually be carried into execution, is by force of arms. In one sense, all government, whether provisional or *quasi* civil, established under such circumstances, must assume a military character. In that view it can be controlled by Congress only through use of the military power of the army. Yet the President is bound to execute all laws which Congress has a right to make; and so far as the Legislature has the *authority* to interfere with or control the President by laws or by regulations, or by imposing upon him the machinery of provisional governments, so far he is bound to administer them according to statute.

LIMITS OF POWER. CONFLICT BETWEEN THE WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS.

Though the Executive, Legislative, and Judicial departments of our government are to a certain extent independent of each other, yet no one of these departments is without some control over the others. The legislature can make no law without the concurrence of the President, unless passed by two-thirds of the voters in both houses; and laws, when made, are void if pronounced unconstitutional by the Supreme Judicial Court. The judiciary, in deciding purely political questions, are bound to follow the decisions of the Legislative or Executive departments, and are in other respects controlled by the action of the coördinate branches of the government. The Executive can make treaties only by concurrence of the Senate; and most of the appointments to high offices must, to be valid, be made with its

advice and consent. The President cannot declare war; but Congress can. Congress cannot carry on war; but the President can. Congress may make rules and regulations concerning captures, and for the government and regulation of the land and naval forces, when in service, binding upon the President, whose duty it is to see *all* constitutional laws faithfully executed, while he is made the supreme commander of the army and navy.

Questions may therefore arise as to the limitation of the respective powers of the Commander-in-Chief in conducting hostilities, and the powers of Congress in controlling him, by virtue of this legislative right to make rules and regulations for the government of military forces, and respecting captures on land and sea.

To determine how far Congress may interfere with and govern the military operations of the Executive, when the war power is employed in enforcing *local government* by martial law, without derogating from his power as Commander-in-Chief of the army, will require careful consideration, inasmuch as such government can be in fact maintained and enforced only by military, and not by legislative authority.

HOW THESE GOVERNMENTS MAY BE TERMINATED.

Military governments may be terminated by the commanding general at his will, by withdrawal of the officers who administer it.

As it is in the power of the Legislative Department to declare war, and to provide or withhold the means of carrying it on, Congress also may, after hostilities shall have ceased, declare or recognize peace, terminate military or provisional governments, or may regulate them

and cause them to be modified or wholly withdrawn, whether originally erected by its own authority or by the war power of the President, and may institute civil territorial governments in their place.

Or the people of the district, having formed a new government for themselves, by permission of the United States, may be admitted into the Union as a State, and thus the military government will be displaced.

But military governments are not of necessity terminated by a declaration of peace between belligerents, or a cession of territory in dispute, but may be continued long after war ceases, by presumed assent of the President and of Congress.

"The right inference," says Mr. Justice Wayne, in delivering the unanimous opinion of the Supreme Court,* "from the inaction of both the President and of Congress, is, that it (the military government) was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the cause of delay, it must be presumed that the delay was consistent with the true policy of the Government." "California and New Mexico were acquired by conquest confirmed by cession. During the war they were governed as conquered territory, under the law of nations, and in virtue of the belligerent rights of the United States as the conqueror, by the direction and authority of the President as Commander-in-Chief. By the ratification of the treaty of Guadalupe-Hidalgo, on the 20th of May, 1848, they became a part of the United States, as ceded conquered territory. The civil governments established in each during the war, and existing at the date of the treaty of peace, continued in

* Cross *vs.* Harrison, 16 How. 193.

operation after that treaty had been ratified. California, with the assent and coöperation of the existing government, formed a constitution which was ratified by its inhabitants, and a State government was put in full operation in December, 1849, with the implied assent of the President, the officers of the existing government of California publicly and formally surrendering all their powers into the hands of the newly-constituted authorities. The constitution so formed and ratified was approved by Congress, and California was, on the 9th of September, 1850, admitted into the Union as a State. New Mexico also formed a constitution, and applied to Congress for admission; the application was not granted, but on the 9th of September, 1850, New Mexico, and that part of California not included within the limits of the new State, were organized into territories, with new territorial governments, which took the place of those organized during the war, and existing on the restoration of peace." *

Such governments, founded only in and sustained by war power, are, when peace is officially recognized, entirely within the control of Congress.

When the enemy have laid down their arms, and make no further opposition to the execution of our laws, there can exist no reason why the President should not obey and enforce the rules and statutes of Congress, regulating his own conduct and the military governments and military tribunals established by him. No reason could be offered to explain why he should not make complete and unquestioning submission to the will of the people. His refusal to do so would subject him to impeachment.

* Halleck, Int. Law, 828, 829.

There seems to be less danger to civil liberty from the use of military governments and tribunals as temporary instruments for carrying on war and of securing conquest, than from any other use of military forces.

CHAPTER VII.

It has been shown in the foregoing chapters, that the President has authority to establish military governments over enemy territory in time of war, —

1st. Because such governments are necessary to the successful prosecution of hostilities, and to secure the objects for which war has been waged.

2d. Because the Constitution, by making him Commander-in-Chief of the army, confers on him the right to use all proper means of warfare, including war-governments and war-courts; and

3d. Because the Supreme Court have recognized this authority, and have given to it the sanction of law by their decisions.

The next question will relate to the character and extent of the powers to be exercised by military governments.

JURISDICTION OF MILITARY GOVERNMENTS.

To such military governments as are established by the Commander-in-Chief, in time of war, he may delegate more or less power, according to the object for which he has instituted them.

In the District of Columbia, a military governor has been appointed for the performance of certain limited duties essential to the regulation of the police of the forces, stationed within the defences of Washington, the treatment of persons under arrest and in prison, and other important specific duties. In the mean time, the

sessions of the Supreme Court of the United States, and of the local courts, and of Congress, and the business of all the departments of the Government, are undisturbed.

In districts of country declared to be in rebellion, whose inhabitants are "public enemies," such governments have been commissioned with powers to administer local, municipal, civil, and criminal law, and with jurisdiction embracing all persons and all questions which may arise therein.

There is no other necessary limit to the jurisdiction of a military governor, than there is to that authority under which he received his appointment. The existence of state or municipal governments, or of military, civil, or ecclesiastical tribunals, established before the war began, in the rebellious districts, does not affect the jurisdiction of such governments or courts as may be erected therein by the war power of the United States. Since these sections of country have become hostile — the inhabitants thereof being now public enemies — no authority of such enemies, executive, judicial, or military, can be recognized by the conqueror as rightful or legitimate. No legislature, no judiciary of a public enemy, can be permitted to retain or exercise any jurisdiction or control over persons or property found in that region which is within the military occupation of our army.

The enemy's courts and legislatures derive their right to ordain and enforce laws from a government at open war with our own, — one which we refuse to recognize, and we might as well acknowledge the independence of the seceding States, and surrender to their army, as to subject ourselves, or to allow others, to pay obedience to their laws, their courts, or their jurisdiction.

A public enemy has no jurisdiction, either by courts instituted by him, or by any civil, military, or judicial

officers appointed by him, to exercise authority in any locality which is held by our military power. But all persons and all subjects who are found there, are under our military control, whether that control be exercised by soldiers in the field, or by military governors, who may call to their aid military tribunals, or may even allow civil tribunals to proceed under military authority.

The only limitations to the jurisdiction of such military power over persons and property, are such as are derived from the laws of war; though in the United States further limitations may be prescribed by laws of Congress.

Hence, aliens residing in belligerent districts, non-combatants, whether neutral, friendly or hostile, persons engaged in hostility, persons belonging to the invading country, and accompanying the army, are alike within the jurisdiction of a military government, and of military courts duly established therein.

CHAPTER VIII.

THE LAW ADMINISTERED BY MILITARY GOVERNMENTS.

As the powers of a *de facto* government belong to the conqueror by the laws of war, he may suspend, modify, or abrogate all municipal laws of those whom he has conquered; he may disregard their former civil rights and remedies; he may introduce and enforce a new code of laws, military and municipal, and may carry them into effect by new military tribunals, having abolished all courts and offices held under the authority of his enemy. *

It has been held by the Supreme Court that "the laws, whether in writing or evidenced by the usage and customs of the conquered or ceded country, *continue in force till altered* by the new sovereign." †

while If they continue in force, it is by the express or implied permission of the new sovereign, and until altered by him. They are recognized only as an expression of the will of the conqueror.‡ If the law should conflict with the will of the conqueror, the LAW must yield;

* Halleck, Int. Law, pp. 830–831, and cases there cited.
Bowyer, Universal Public Law, ch. 16, 158.
Fabrigas *vs.* Mostyn, 1 Cowper, 165.
Gardner *vs.* Fell, 1 Jacob & Walker, 27.
Flemming *et al. vs.* Page, 9 How. 603.
Am. Ins. Co. *vs.* Canter, 1 Peters, 542.
Cross *et al. vs.* Harrison, 16 How. 164.
Heffter, Droit Int'l, sect. 185.

† Strother *vs.* Lucas, 12 Peters, 436, and authorities there cited.

‡ For the operation of transfers of territory upon the laws and rights of

otherwise the conqueror would be subjected to the rule of those whom he has subjugated.

But the local laws of a conquered country may be changed not only by the law-making power of the conquering country, but by virtue of the BELLIGERENT rights of the conqueror.*

All these propositions follow from the fact that the power of a public enemy to make or administer law is terminated by the conquest of that territory by a different law-making and law-administering power, viz., that of the conqueror.

The local laws of a conquered country of which our army holds military occupation, have no force or effect whatever, except by our permission. When such local laws agree with those of the invading country, such laws may be, and usually are, adopted and sanctioned because they do so agree therewith. Thus rules governing the rights of property, the relations of persons,

the inhabitants of the territory ceded or conquered, see, among other authorities, the following, viz: —

Vattel, B. B. ch. 13, sects. 199, 201.
4 Com. Dig. Ley. (C.)
Calvin's Case, 7 Coke, 176.
Blankard *vs.* Galdy, 2 Salk. 411; S. C. 2 Mod. 222.
Mostyn *vs.* Fabrigas, Cowp. 165.
Hall *vs.* Campbell, Cowp. 204, 209.
Anon. 2 P. Williams, 76.
Ex parte Prosser, 2 Br. C. C. 325.
Elphinstone *vs.* Bedreechund, Knapps P. C. R. 338.
Ex parte Anderson, 5 Ves. 240.
Evelyn *vs.* Forster, 8 Ves. 96.
Sheddon *vs.* Goodrich, 8 Ves. 482.
2 Ves. Jr. 349.
Att'y Gen'l *vs.* Stewart, 2 Meriv. 154.
Gardiner *vs.* Fell, 1 Jac. and W. 77.
8 Wheaton, 589; 12 Wheaton, 528–535.
6 Pet. 712; 7 Pet. 86, 87; 8 Pet. 444–465.
9 Pet. 133, 734, 749.

* Cross *vs.* Harrison, 16 How. 199.

and the laws of crimes in the respective countries of the belligerents are often so nearly alike that the administration of them is permitted to remain unchanged even in war. But no law or institution established by law is permitted to survive, which is in conflict with those of the conqueror.

In all cases, the will of the conqueror governs. Hence, in a ceded or subjugated territory, all laws violating treaty stipulations with foreign nations, or granting ranks and titles or commercial privileges in conflict with the institutions of the conqueror, are abrogated.*

It has been asserted that the municipal laws of a belligerent territory remain in force, "*proprio vigore*," until altered by military orders; but, although such laws may have been tacitly adopted, or the enforcement thereof may have been permitted, it is not because these laws retained any validity "*proprio vigore*." Their only validity was derived from the tacit or express sanction and adoption thereof by the will of the commander-in-chief of the invading army.

In case of conquest of a foreign country, the question has been asked, what laws, if any, of the invading country are *ipso vigore*, and without legislation extended over the territory acquired in war?

The suppression of the present rebellion is not the conquest of a *foreign* country. The citizens of the United States residing in the districts in rebellion are not *alien* enemies, though they are *public* enemies; and it is important, in several points of view, to observe the dis-

* Halleck, Int. Law, 833, 834, and authorities there cited:
Bowyer, Univ. Pub. Law, ch. 16.
Campbell *vs.* Hall, 1 Cowper, 205.
Fabrigas *vs.* Mostyn, 1 Cowp. 165.
Gardner *vs.* Fell, 1 Jacob and Walk. 27, 30, note.
Att'y Gen'l *vs.* Stewart, 2 Merivale, 159.

tinction between enemies who are subjects of a foreign government, and are therefore called "*alien enemies*," and those who are denizens and *subjects* of the United States, and being engaged in civil war, are called "*public enemies*."

An alien owes no allegiance or obedience to our government, or to our constitution, laws, or proclamations. A citizen subject is bound to obey them all. In refusing such obedience, he is guilty of crime against his country, and finds in the law of nations no justification for disobedience. An alien, being under no such obligation, is justified in refusing such obedience. Over an alien enemy, our government can make no constitution, law, or proclamation of obligatory force, because our laws bind only our own subjects, and have no extra-territorial jurisdiction.

Over citizens who are subjects of this government, even if they have so far repudiated their duties as to become enemies, our constitution, statutes, and proclations are the supreme law of the land. The fact that their enforcement is resisted does not make them void. It is not in the power of armed subjects of the Union to repeal or legally nullify our constitution, laws, or other governmental acts.

The proclamation of the President, issued during the present rebellion, in executing the powers conferred on him by the Constitution ~~and~~, the Acts of Congress, in executing ~~their~~ its powers, and the decisions of the Supreme Court of the United States, are all, in one respect, "like the Pope's bull against the comet;" the proclamation, the laws, and the decisions are alike resisted and spurned by our adversaries; neither can be enforced until the enemy is overthrown. But when the soldiers of the Union shall have routed and dispersed the last armed

force of the rebellion, and when the supremacy of our military power is undisputed, the constitution, the laws of Congress, the proclamation, and the decisions of the Supreme Court, will at the same time, *pari passu*, be acknowledged and enforced. It is, therefore, idle to speculate upon the legal validity and operation of the proclamation liberating enemies' slaves, in districts not yet secured in our military possession. It would be equally useless to attempt to determine the validity and operation of our constitution, laws, and decisions of courts in these rebellious districts. Neither of them will be enforced upon the enemy until they have been subjugated. When that event takes place, whether it be the result of battles or of returning sanity of repentant madmen, the army of the United States will then have actual possession of every portion of the United States, and of every slave who may be found therein; and the rights of the slave to his freedom under the constitution, the statutes passed, and the proclamations issued by the Government during the war, will be secured to him at the same time that other rights under the same Constitution and proclamations will be secured to the other inhabitants of the country.

And there can be no doubt that in civil war the laws of the United States, rightfully extending at all times over the whole country, are to be enforced, so far as applicable, in time of war, over the belligerent territory as fast as it comes under our military control; and that in case of complete conquest, the constitution and laws of the Union will be restored to full operation over all the inhabitants thereof. At the same time, the laws of war will have swept away all local hostile authorities, and all laws, rights, and institutions resting solely thereon.

The Commander-in-Chief has the right, during war, to treat all local laws as inoperative, or to adopt some and reject others; to permit the holding of courts by local authorities acting under military power of the conqueror, or to forbid them, and to substitute military courts of his own. Having all the rights of war over the subjugated inhabitants, he has all the powers of a government *de facto* and *de jure*, and can therefore impose upon them whatever laws or regulations may suit his pleasure, in accordance with the laws of war. The LAWS OF WAR are the only laws required by the Constitution to be laid by military power upon public enemies in time of civil war. Congress may modify by legislation the hardship of belligerent rights.

But whatever may be done or omitted by the President or by Congress, the laws and municipal institutions of the conquered inhabitants are "swept by the board." Whatever law is rightfully administered, is law expressly declared or tacitly permitted by the will of the conqueror.

JUDICIAL COURTS OF THE UNITED STATES.

The courts judicial, as established by laws of Congress in the seceded States, having been closed by civil war, may be reëstablished whenever the districts over which they have jurisdiction shall be permanently reduced under the power of the United States.

When the officers of such courts, either by engaging in rebellion or otherwise, have become in law public enemies, their right to exercise judicial or other functions under authority of the United States ceased, and their offices were vacated. If new appointments were to be made now, it is obvious that the authority of courts would be enforced only by military power; their

jurisdiction would be very limited; such juries as they could summon would probably be hostile to the Union, and the powers of judges, under present laws, would be be totally inadequate to meet the demands of these turbulent times. Hence it would be worse than useless to erect *judicial* courts before *peace* is completely restored. It would tend to bring the judiciary into contempt. Therefore it can hardly be deemed advisable to interfere with the stern, effective, but necessary government of hostile people by military power, until Congress shall by legislative act *recognize* a state of peace.

* For authorities on this question, see
Halleck, Int. Law, 832,
Calvin's Case, 7 Coke's Report Part 7.
Gardner *vs.* Fell, 1 Jacob and Walker, 22.
Cross *vs.* Harrison, 16 How. 165.
Collet *vs* Lord Keith, 2 East. 260.
Blankard *vs.* Guldy, 4 Mad. 225.

APPENDIX.

THE most important cases decided by the Supreme Court of the United States, in relation to the subjects discussed in the foregoing pages, are: —

Fleming *vs.* Page, 9 How. 614.
Cross *vs.* Harrison, 16 How. 189.
Jecker *vs.* Montgomery, 18 How. 112.
Dynes *vs.* Hoover, 20 How. 79.
Leitensdorfer *vs.* Webb, 20 How. 177.
Vallandigham's case. Appendix, 88.

From these cases, for more convenient reference, the following passages have been extracted.

FLEMING *vs.* PAGE, 9 Howard's S. C. Rep. 614.

Mr. Chief-Justice TANEY delivered the opinion of the Court:

The question certified by the Circuit Court turns upon the construction of the Act of Congress of July 30, 1846. The duties levied upon the cargo of the schooner Catharine were the duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment Tampico was not a foreign port, within the meaning of the Act of Congress, then the duties were illegally charged, and, having been paid under protest, the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

Tampico was subject to the sovereignty and dominion of the U. S.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly, at the time of the shipment, *subject to the sovereignty and dominion of the United States.* The Mexican authorities had been driven out, or had submitted to our army and navy, and the country was in the exclusive and firm possession of the United States, *and governed by its military authorities, acting under the orders of the President.* But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the Acts of Congress.

Tampico was governed by our military authorities.

The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general gov-

ernment to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest, or the acquisition of territory: nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. *As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States.* But his conquests do not enlarge the boundaries of this Union, *nor extend the operation of our institutions and laws beyond the limits before assigned to them* by the legislative power.

Powers of the President as Commander-in-Chief to govern the army and employ it, —— to invade, to subjugate, not to extend the limits of Union.

It is true that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

Tampico *ours*, — as against foreign countries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms, did not depend upon the laws of nations, but upon our own Constitution and Acts of Congress. The power of the President, under which Tampico and the State of Tamaulipas were conquered and held in subjection, was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not their own: the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy when he surrenders to a force which he is unable resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and

be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign, nor did our laws extend over it. Tampico was therefore a foreign port when this shipment was made.

Again, there was no Act of Congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector; and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another. The *person who acted in the character of collector* in this instance, acted as *such under the authority of the military commander, and in obedience to his orders; and the duties he exacted and the regulations he adopted were not those prescribed by law, but by the President in his character of commander-in-chief.* The custom-house was established in an enemy's country, *as one of the weapons of war.* It was established, not for the purpose of giving to the people of Tamaulipas the benefits of commerce with the United States, or with other countries, *but as a measure of hostility, and as a part of the military operations in Mexico;* it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than *contributions levied* upon the enemy, which *the usages of war justify when an army is operating in the enemy's country.* The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognized in any port of the United States as the documents required by the Acts of Congress, when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

Collection of duties by military authority.

An act of hostility.

Contributions may be levied.

This construction of the revenue laws has been uniformly given by the Administrative Department of the government in all cases that have come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department, that goods imported from Pensacola before an Act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that, although Florida had by cession actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by an Act of Congress, and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the Government. And, although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island and certain ports in Louisiana after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other set-

tlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-coast. The Department, in no instance that we are aware of, since the establishment of the Government, has ever recognized a place in a newly-acquired country as a domestic port from which the coasting trade might be carried on, unless it had been previously made so by Act of Congress.

The principle thus adopted and acted upon by the Executive Department of the government has been sanctioned by the decisions in this Court and the Circuit Courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. And all of them, so far as they apply, maintain that under our revenue laws every port is regarded as a foreign one unless the custom-house from which the vessel clears is within a collection district established by Act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.

In the view we have taken of the question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, *neither claimed nor exercised* any rights or powers in relation to the territory in question, *but the rights of war*. After it was subdued, it was uniformly treated as an enemy's country, and restored to the possession of the Mexican authorities when peace was concluded. And certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the Government are brought into question. Our own Constitution and form of government must be our only guide. And we are entirely satisfied that under the Constitution and laws of the United States Tampico was a foreign port, within the meaning of the Act of 1846, when these goods were shipped, and that the cargoes were

liable to the duty charged upon them. And we shall certify accordingly to the Circuit Court.

CROSS *vs.* HARRISON, 16 Howard's S. C. Rep. 189.

"Indeed, from the letter of the then Secretary of State, and from that of the Secretary of the Treasury, we cannot doubt that the *action of the Military Governor of California was recognized as allowable and lawful* by Mr. Polk and his cabinet. We think it was a rightful and correct recognition under all the circumstances, and when we say rightful, *we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import* duties to the ports of California.

Constitution authorized acts of military government in collecting revenue.

California, or the port of San Francisco, had been captured by the arms of the United States as early as 1846. Shortly afterward, the United States had military possession of all of Upper California. Early in 1847, the *President, as constitutional Commander-in-Chief of the army and navy*, authorized the military and naval commander of our forces in California *to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country*, and to *impose duties* on imports and tonnage as *military contributions* for the support of the government and of the army which had the conquest in possession. We will add, by way of note, to this opinion, references to all of the correspondence of the government upon this subject; now only referring to the letter of the Secretary of War to General Kearney, of the 10th of May, 1847, which was accompanied with a tariff of duties on imports and tonnage, which had been prepared by the Secretary of the Treasury, with forms of entry and permits for landing goods, all of which was reported by the Secretary to the President on the 30th of March, 1847. Senate Doc. No. 1, 1st Sess., 30th Congress, 1847, pp. 567, 583. *No one can doubt that these orders of the President, and the action of our army and navy commander in California in conformity with them, were according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace.* . . . . . .

Belligerent right of the President to institute military and civil government over California.

No doubt of authority.

"The plaintiffs, therefore, can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded in fact to the United States, but it was a conquered territory within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them."

But *after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory.* Our inquiry here is to be whether or not the cession gave any right to the plaintiffs to have the duties restored to them which they may have paid between the ratifications and exchange of the treaty and the notification of that fact by our Government to the Military Governor of California. It was not received by him until two months after the ratification, and not then with any instructions or even remote intimation *from the President that the civil and military government, which had been instituted during the war*, was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington. . . . . .

After *treaty* California became *part of the U. S.*, a ceded conquered territory.

Civil and military government during the war instituted by the President.

The ratification of the treaty of peace was proclaimed in California by Colonel Mason, on the 7th of August, 1848. Up to this time, it must be remembered that Captain Folsom, of the Quartermaster's Department of the Army, had been the *collector of duties under the war tariff*. On the 9th of August he was informed by Lieut. Halleck, of the Engineer Corps, who was the Secretary of State of the Civil Government of California, that he would be relieved as soon as a suitable citizen could be found for his successor. He was also told that "the tariff of duties for the collection of military contributions was immediately to cease, and that the revenue laws and tariff of the United States will be substituted in its place." The view taken by Governor Mason of his position has been given in our statement. The result was to continue the existing government, as he had not received from Washington definite instructions in reference to the existing state of things in California.

His position was unlike anything that had preceded it in the history of our country. The view taken of it by himself has been given in the statement in the beginning of this opinion. It was not without its difficulties both as regards the principle upon which he should act, and the actual state of affairs in California. He knew that the Mexican inhabitants of it had been remitted by the treaty of peace to those municipal laws and usages which prevailed among them before the territory had been ceded to the United States, but that a state of things and population had grown up during the war, and after the treaty of peace, which made some other authority necessary to maintain the rights of the ceded inhabitants and of immigrants, from misrule and violence. He may not have comprehended fully the principle applicable to what he might rightly do in such a case, but he felt rightly, and acted accordingly. He determined, in the absence of all instruction, to maintain the existing government. The *territory had been ceded as a conquest*, and *was to be preserved and governed as such* until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union with only such limitations as are expressed in the section in which this power is given. *The government* of which Colonel Mason was the executive, *had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army* and navy officers who administered it, but he did not do so. *Congress could have put an end to it, but that was not done.* The right inference from the inaction of both is, that it was meant to *be continued until it had been legislatively changed.* No presumption of a contrary intention can be made. Whatever may have been the causes of the delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a state government which was subsequently recognized by Congress under its power to admit new States into the Union.

Origin of this government;

How instituted.

It did not cease by restoration of peace;

Dissolved by power of President, or by Congress.

Civil government established as a war right.

In confirmation of what has been said in respect to the power of Congress over this territory, *and the continuance of the civil government established as a war right*, until Congress acted upon the subject, we refer to two of *the decisions of this Court*, in one of which it is said, in respect to the treaty by which Florida was ceded to the United States, "This treaty is the law of the land, and admits the inhabitants of Florida to the *enjoyment of the privileges, rights, and immunities of the citizens of the United States.* It is unnecessary to inquire whether this is not their condition independently of stipulations. *They do not, however, participate in political power,—they do not share in the government until Florida shall become a State.* In the mean time Florida continues to be a territory of the United States, guarded by virtue of that clause of the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States. *Perhaps the power of governing a territory belonging to the United States, which has not by becoming a State acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States.* The right to govern may be the natural consequences of the right to acquire territory." American Insurance Company *vs.* Canter, 1 Peters, 542, 543. (See also U. S. *vs.* Gratiot, 14 Peters, 526.) . . . . . .

Rights of citizenship not necessarily accompanied by *political* power.

Power of governing a territory—how it results.

When military government in California *ceased.*

"Our conclusion, from what has been said, is, that the *civil government* of California, *organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty, or from its ratification.* We think it *was continued over a ceded conquest, without any violation of the Constitution or laws of the United States*, and that, until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason." . . . . .

What laws are in force after conquest.

Right of the conqueror to regulate trade.

"The second objection states a proposition larger than the case admits, and more so than the principle is, which secures to the inhabitants of a ceded conquest the enjoyment of what had been their laws before, until they have been changed by the new sovereignty to which it has been transferred. In this case, *foreign trade had been changed in virtue of a belligerent right, before the territory was ceded as a conquest*, and after that had been done by a treaty of peace, the *inhabitants were not remitted to those* regulations of trade under which it was carried on whilst they were under Mexican rule; because they had passed from that sovereignty to another, whose privilege it was to permit the existing regulations of trade to continue, and by which only they could be changed. We have said, in a previous part of this opinion, that the sovereignty of a nation regulated trade with foreign nations, and that *none could be carried on except as the sovereignty permits it to be done.* In our situation, that sovereignty is the constitutional delegation to Congress of the power 'to regulate commerce with foreign nations and among the several States, and with the Indian tribes.'" . . . . . .

"But we do not hesitate to say, if the reasons given for our conclusions in this case were not sound, that other considerations would bring us to the same results. The plaintiffs carried these goods

voluntarily into California, knowing the state of things there. They knew that there was an existing civil government, instituted by the authority of the President as commander-in-chief of the army and naval forces of the United States, by the right of conquest; that it had not ceased when these first importations were made; that it was afterwards continued, and rightfully, as we have said, until California became a State, that they were not coerced to land their goods, however they may have been to pay duties upon them; that such duties were demanded by those who claimed the right to represent the United States (who did so, in fact, with most commendable integrity and intelligence); that the money collected has been faithfully accounted for, and the unspent residue of it received into the treasury of the United States; and that the Congress has by two acts adopted and ratified all the acts of the government established in California upon the conquest of that territory, relative to the collection of imposts and tonnage, from the commencement of the late war with Mexico to the 12th November, 1849, expressly including in such adoption the moneys raised and expended during that period for the support of the actual government of California after the ratification of the treaty of peace with Mexico. This adoption sanctions what the defendant did. It does more; it affirms that he had legal authority for his acts. It coincides with the views which we have expressed in respect to the legal liability of the plaintiff for the duties paid by them, and the authority of the defendant to receive them as Collector of the port of San Francisco."

JECKER *vs.* MONTGOMERY, 18 Howard's S. C. Rep. 112.

All citizens of States at war are *enemies* of each other.

"As a principle applicable to the first of these inquiries, it may be averred as a part of the law of nations, — forming a part, too, of the municipal jurisprudence of every country, — "that in a state of war between two nations, declared by the authority in whom the municipal constitution vests the power of making war, *the two nations and all their citizens or subjects are enemies to each other.*" The consequence of this state of hostility is, that *all intercourse and communication* between them is *unlawful. Vide* Wheaton on Maritime Captures, ch. 7, p. 209, quoting from Bynkershoeck this passage: 'Ex natura belli commercia inter hostes cessare, non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli, commercia inter hostes esse vetita, ipsæ indictiones bellorum satis declarant.' . . . . . .

"The same rule has been adopted, with equal strictness, by this court. In the case of The Rapid, reported in 8 Cranch, 155, the claimant, *a citizen* of the *United States*, had *purchased goods* in *the enemy's country, a long time before the declaration of war*, and had deposited them on an island, near the boundary line between the two countries. Upon the breaking out of hostilities, his agent had hired the vessel to proceed to the place of deposit, and bring away these goods. Upon her return, the vessel was captured, and with the cargo was condemned as prize of war for trading with the enemy. In applying the law to this state of facts, this Court said, and said unanimously, "That the *universal* sense of nations has acknowledged the *demoralizing effects that would result from the ad-*

All are enemies.

mission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country. But, after deciding what is the duty of the citizen, the question occurs, What is the consequence of a breach of that duty? The law of prize is a part of the law of nations. In it, a *hostile character is attached to trade, independently of the character of the trader*, who pursues or directs it. *Condemnation to the use of the captor, is equally the fate of the property of the belligerent, and of the property engaged in anti-neutral trade. But a citizen or an ally* may be engaged in a *hostile trade*, and thereby *involve his property in the fate of those in whose cause he embarks.*"

Non-intercourse.

Again the Court say, "If, by *trading*, in prize law was meant that signification of the term which consists in *negotiation or contract*, this *case would not come under the penalties of the rule. But the object and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent nations. Negotiation or contract has, therefore, no necessary connection with the offence. Intercourse inconsistent with actual hostility, is the offence against which the operations of the rule is directed.*" . .

Enemy property.

"The same course of decision which has established that *property of a subject or citizen taken trading with the enemy is forfeited*, has decided also that it is *forfeited as prize.* The ground of the forfeiture is, *that it is taken adhering to the enemy, and therefore the proprietor is pro hac vice to be considered an enemy. Vide* also Wheaton on Captures, p. 219; and 1 C. Robinson, 219, the case of The Nelly."

Attempts have been made to evade the rule of public law, by the interposition of a neutral port between the shipment from the belligerent port and their ultimate destination in the enemy's country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation; and it has been ruled that, *without license from government, no communication, direct or indirect, can be carried on with the enemy;* that the interposition of a prior port makes no difference; that all the trade with the enemy is illegal, and the circumstance that the goods are to go first to a neutral port will not make it lawful. 3 C. Robinson, 22. The Indian Chief; and 4 C. Robinson, 79. The Jonge Pieter. . . . . .

Non intercourse.

Trade unlawful.

DYNES *vs.* HOOVER, 20 Howard's S. C. Rep. 78.

The demurrer admits that the court martial was lawfully organized; that the crime charged was one forbidden by law; that the court had jurisdiction of the charge as it was made; that a trial took place before the court upon the charge, and the defendant's plea of not guilty; and that, upon the evidence in the case, the court found Dynes guilty of an attempt to desert, and sentenced him to be punished, as has already been stated; that the sentence of the court was approved by the Secretary; and that, by his direction, Dynes was brought to Washington; and that the defendant was marshal for the District of Columbia; and that in receiving Dynes, and committing him to the keeper of the penitentiary, he obeyed the orders of the President of the United States, in execution of the

sentence. Among the powers conferred upon Congress, by the 8th section of the 1st Article of the Constitution, are the following: "to provide and maintain a navy;" "to make rules for the government of the land and naval forces." *And the 8th Amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operations "cases arising in the land or naval forces"* And by the 2d section of the 2d Article of the Constitution, it is declared that "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

Construction of 8th amendment Grand jury not required in cases, etc.

These provisions show that *Congress has the power to provide for the trial and punishment of military and naval offences, in the manner then and now practiced by civilized nations; and that the power to do so, is given without any connection between it and the 3d Article of the Constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other...*

Power of Congress to make laws for punishment of military and naval offences.

"The objection is ingeniously worded, was very ably argued, and we may add, with a clear view and knowledge of what the law is upon such a subject, and how the plaintiff's case may be brought under it, to make the defendant responsible on this action for false imprisonment. But it substitutes an imputed error in the finding of the Court, for the original subject matter of its jurisdiction, *seeking to make the marshal answerable* for his mere *ministerial execution of a sentence*, which the Court passed, the Secretary of the Navy approved, and which the President of the United States, as constitutional Commander-in-Chief of the army and navy of the United States, directed the marshal to execute, by receiving the prisoner and convict, Dynes, from the naval officer then having him in custody, to transfer him to the penitentiary, in accordance with the sentence which the Court had passed upon him. . . . . .

Has no connection with the judicial power.

Marshal not liable for ministerial act in executing sentence, etc.

"But the case in hand is *not one of a court without jurisdiction* over the subject matter, or that of one which has neglected the forms and rules of procedure enjoined for the exercise of jurisdiction. It was regularly convened; its forms of procedure were strictly observed as they are directed to be by the statute; and if its sentence be a deviation from it, which we do not admit, it is not absolutely void. Whatever the sentence is, or may have been, as it was not a trial by court martial taking place out of the United States, it could not have been carried into execution but by the confirmation of the President, had it extended to loss of life, or in cases not extending to loss of life, as this did not, but by the confirmation of the Secretary of the Navy, who ordered the Court. *And if a sentence be so confirmed, it becomes final, and must be executed, unless the President pardon the offenders. It is in the nature of an appeal to the officer ordering the court, who is made by the law the arbiter of the legality and propriety of the court's sentence. When confirmed it is altogether beyond the jurisdiction of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge,* or one in which, having jurisdiction over the subject matter, it *has failed to observe the rules prescribed by the statute for its exercise.* In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury." . . . . . .

Sentence of court martial *final.*

Civil courts have no jurisdiction over the *sentence.*

Except.

Civil courts have no right to interfere with sentences of courts martial.

"*With the sentences of courts martial* which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, *civil courts have nothing to do*, nor are they in *any way alterable by them.* If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court martial has no *jurisdiction over the subject matter of the charge* it has been convened to try, or shall inflict a punishment *forbidden by the law*, though its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress. (Harman *vs.* Tappenden, 1 East 555; as to ministerial officers, Marshall's Case, 10 Cr. 76; Morrison *vs.* Sloper, Wells, 30; Parton *vs.* Williams, B. and A. 330; and as to justices of the peace, by Ld. Tenterden, in Basten *vs.* Carew, 3 B. and C. 653; Mules *vs.* Calcott, 6 Bins. 85." . . . . .

Except.

Imprisonment in penetentiary of Dynes.

Authority of sentence confirmed.

"In this case all of us think that *the court* which tried Dynes *had jurisdiction* over the subject matter of the charge against him; that the *sentence* of the court against him was *not forbidden by law;* and that having been *approved by the Secretary of the Navy* as a fair deduction from the 17th Article of the Act of April 23, 1800, and that *Dynes* having been *brought to Washington as a prisoner* by the *direction of the Secretary*, that the *President* of the United States, as constitutional Commander-in-Chief of the army and navy, and in virtue of his constitutional obligation that he shall take care that the laws be faithfully executed, *violated no law in directing the Marshal to receive the prisoner Dynes* from the officer commanding the United States steamer Engineer, for the purpose of transferring him to the penitentiary of the District of Columbia, and, consequently, that the *Marshal is not answerable in this action of trespass and false imprisonment.*"

LEITENSDORFER *vs.* WEBB, 20 Howland's S. C. Rep. 176.

Civil government of N. Mexico overthrown by conquest

Porvisional government ordered by Gen. Kearney.

Duty.

How far their former rights were changed.

What law is to be administered by military power.

"Upon the acquisition, in the year 1846, by the arms of the United States, of the Territory of New Mexico, the *civil government* of this territory having *been overthrown*, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and *in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional or temporary government for the acquired country.* By this substitution of a *new supremacy*, although the former *political relations* of the inhabitants were dissolved, their private relations, *their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States*, OR WITH ANY REGULATIONS WHICH THE CONQUERING AND OCCUPYING AUTHORITY SHOULD ORDAIN. Amongst the consequences which would be necessarily incident to the *change* of *sovereignty*, would be the *appointment or control of the agents by*

whom and the modes in which the government of the occupant should be administered, — this result being indispensable, in order to secure those objects for which such a government is usually established."

Conquest gives rights to change government and officers thereof in order to secure victory.

This is the principle of the law of nations, as expounded by the highest authorities. In the case of The Fama, in the 5th of Robinson's Rep. p. 106, Sir William Scott declares it to be "the settled principle of the law of nations, that the *inhabitants of a conquered territory change their allegiance*, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property *not taken from them by the orders of the conqueror*, remain undisturbed." So, too, it is laid down by Vattel, book 3d, ch. 13, sect. 200, that "the conqueror lays his hands on the possessions of the state, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is that they only change masters."

In the case of the United States *vs.* Perchiman, 7 Peters, pp. 86, 87, this court have said, "It may be not unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world be outraged, if private property should be *generally* confiscated and *private rights annulled*. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." (*Vide* also the case of Mitchel *vs.* The United States, 9th ib. 711, and Kent's Com. vol. 1, p. 177.)

Judicial system ordained.

Accordingly, we find that there was *ordained by the provisional Government a judicial system, which created a superior or appellate court, constituted of three judges, and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned.*

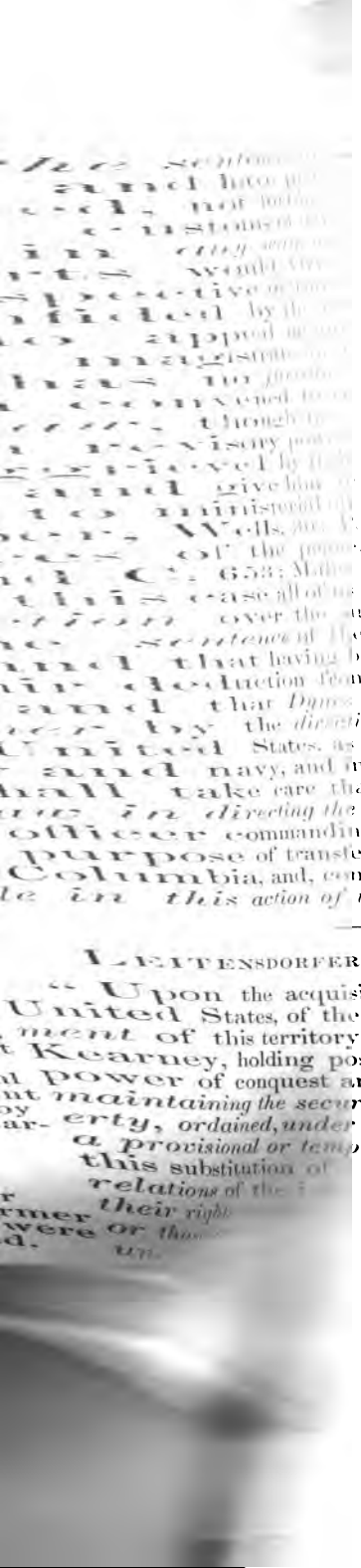
Courts established by military power.

By the same authority, the jurisdiction of the Circuit Courts to be held in the several counties was declared to embrace, 1st, all criminal cases that shall not be otherwise provided for by law; and, 2d, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcades (Vide Laws of New Mexico, Kearney's code, p. 48). *Of the validity* of these ordinances of the provisional government there is made *no question with respect to the period during which the territory was held by the United States as occupying conqueror*, and it would seem to admit of no doubt that during the period of their valid existence and operation. these ordinances *must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them.* But it has been contended, that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties, and that, with the close of the contest, every institution which had been overthrown or suspended would be revived and reëstablished. The *fallacy of this pretension* is exposed by the fact, that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States, never to relinquish the possession ac-

Jurisdiction, etc.

Displaced all old laws incompatable, etc.

When terminated.



tiorari, and against the jurisdiction of a military commission to try the petitioner, that the latter was prohibited by the 30th section of the Act of March 30, 1863, for enrolling and calling out the national forces,—12 Statutes at Large, 736,—as the crimes punishable in it by the sentence of a court-martial or a military commission applied only to persons who are in the military service of the United States, and subject to the articles of war; and also, that by the third section of the 3d Article of the Constitution, all crimes, except in cases of impeachment, were to be tried by juries in the State where the crime had been committed, and when not committed within any State, at such place as Congress may by law have directed; and that the military commission could have no jurisdiction to try the petitioner, as neither the charge against him nor its specifications imputed to him any offence known to the law of the land; that General Burnside had no authority to enlarge the jurisdiction of a military commission by the General Order Number Thirty-eight, or otherwise. General Burnside acted in the matter as the general commanding the Ohio Department, in conformity with the instructions for the government of the armies of the United States, approved by the President of the United States, and published by the Assistant Adjutant-General, by order of the Secretary of War, on the 24th of April, 1863.* Constitutional objections stated.

It is affirmed in the thirteenth paragraph of the first section of these Instructions, that "military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences, under the statute, must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular country. In the armies of the United States, the first is exercised by courts martial; while cases which do not come within the 'rules and articles of war,' or the jurisdiction conferred by statute or court martial, are tried by military commissions."

These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it to set up a government of its own.

Our first remark upon the motion for a *certiorari* is, that there is no analogy between the power given by the Constitution and laws of the United States to the Supreme Court and the other inferior courts of the United States, and to the judges of them to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England the Court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a *certiorari* to have any indictment removed and brought before it; and where such *certiorari* is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United

* They were prepared by Francis Leiber, LL. D., and were revised by a board of officers, of which Major-General E. A. Hitchcock was president.

States derive authority to issue such a writ from the Constitution and the legislation of Congress. To place the two sources of the right to issue the writ in obvious contrast, and in application to the motion we are considering for its exercise by this Court, we will cite so much of the third article of the Constitution as we think will best illustrate the subject. "The judicial power of the United States shall be vested in the Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." "The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting embassadors, other public ministers and consuls," etc., "and in all cases affecting embassadors, other ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." Then Congress passed the act to establish the judicial courts of the United States, — 1 Stats. at Large, p. 73, chap. 20, — and in the 13th section of it declared that the Supreme Court shall have exclusively all such jurisdiction of suits or proceedings against embassadors or other public ministers or their domestics or their domestic servants as a court of law can have or exercise consistently with the laws of nations, and original but not exclusive jurisdiction of suits brought by embassadors, or other public ministers, or in which a consul or vice-consul shall be a party. In the same section the Supreme Court is declared to have appellate jurisdiction in cases hereinafter expressly provided. In this section, it will be perceived that the jurisdiction given, besides that which is mentioned in the preceding part of the section, is an exclusive jurisdiction of suits or proceedings against embassadors or other public ministers or their domestics or domestic servants, as a court of law can have or exercise consistently with the laws of nations, and original, but not exclusive, jurisdiction of all suits brought by embassadors, or other public ministers, or in which a consul or vice-consul shall be a party, thus guarding them from all other judicial interference and giving to them the right to prosecute for their own benefit in the courts of the United States. Thus substantially reaffirming the constitutional declaration that the Supreme Court had original jurisdiction in all cases affecting embassadors and other public ministers and consuls and those in which a State shall be a party, and that it shall have appellate jurisdiction in all other cases before mentioned, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress. Durousseau *vs.* The United States, 6 Cranch, 314; Barry *vs.* Mercien, 5 How. 119; United States *vs.* Currey, 6 How. 113; Forsyth *vs.* United States, 9 How. 571. In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not in law or equity within the meaning of those terms, as used in the third article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act

A military commission not a court, within the meaning of the Judiciary Act.

of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares that all the '[redacted]-mentioned' courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions agreeably to the principles and usages of law. The words in the section, 'the before-mentioned' courts, can only have reference to such courts as were established in the preceding part of the act, and excludes the idea that a court of military commission can be one of them. Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the fourteenth section of the Act; and further that the court cannot, without disregarding its frequent decisions and interpretations of the Constitution in respect to its judicial power, originate a writ of *certiorari* to review or pronounce any opinion upon the proceedings of a military commission. It was natural, before the sections of the third articles of the Constitution had been fully considered in connection with the legislation of Congress, giving to the courts of the United States power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdiction, that by some members of the profession it should have been thought, and some of the early judges of the Supreme Court also, that the 14th section of the Act of 24th September, 1789, gave to this court a right to originate processes of *habeas corpus ad subjiciendum* and writs of *certiorari*, to review the proceedings of the inferior courts as a matter of original jurisdiction, without being in any way restricted by the constitutional limitation that in all cases affecting embassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

No *certiorari* can issue from the Supreme Court to review proceedings of a military commission.

This limitation has always been considered restrictive of any other original jurisdiction. The rule of construction of the Constitution being, that affirmative words in the Constitution declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases. 1 Cranch, 137; 5 Peters, 284; 12 Peters, 637; 9 Wheaton; 6 Wheaton, 264.

The nature and extent of the court's appellate jurisdiction and its want of it to issue writs of *habeas corpus ad subjiciendum*, have been fully discussed by this court at different times. We do not think it necessary, however, to examine or cite many of them at this time. We will annex a list to this opinion, distinguishing what this court's action has been in cases brought to it by appeal, from such applications as have been rejected, when it has been asked that it would act upon the matter as one of original jurisdiction. In the case *Ex parte* Milburn, 9 Peters, 704, Chief Justice Marshall said, as the jurisdiction of the court is appellate, it must first be shown that it has the power to award a *habeas corpus*. In *Ex parte* Kaine, 14 Howard, the court denied the motion, saying that the court's jurisdiction to award the writ was appellative, and that the case had not been so presented to it, and for the same cause refused to issue a writ of *certiorari*, which in the course of the argument was prayed for. In *Ex parte* Metzger, 5 How. 176, it was determined that a writ of *certiorari* could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France,

Military commission exercises special authority;

for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. *So does a court of military commission exercise a special authority.* In the case before us, it was urged that the decision in Met. ger's case had been made upon the ground that the proceedings of the district judge was not judicial in its character, but that the proceedings of the military commission were so; and, further, it was said that the ruling in that case had been overruled by a majority of the judges in Kaine's case. There is a misapprehension of the report of the latter case; and as to the judicial character of the proceedings of the military commission, we cite what was said by the court in the case of Ferreira. "The powers conferred by Congress upon the district judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them, but it is not judicial in either case, in the sense in which the judicial power is granted to the courts of the United States." 13 Howard, 48.

Not *judicial*;

Its proceedings cannot be reversed by the Supreme Court.

Nor cannot it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus ad subjiciendum to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission. And as to the President's action in such matters, and those acting in them under his authority, we refer to the opinions expressed by this court in the cases of Martin *vs.* Mott, 12 Wheaton, pages 19, 28 to 35 inclusive; and Dynes *vs.* Hoover, 20 Howard, page 65, &c.

For the reasons given, our judgment is, that the writ of *certiorari* prayed for to revise and review the proceedings of the military commission, by which Clement L. Vallandigham was tried, sentenced, and imprisoned, must be denied; and so do we order accordingly."

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